A DIGEST OF INDIAN LAW CASES;

CONTAINING

HIGH COURT REPORTS,

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1905.

WITH AN INDEX OF CASES;

BEING A SUPPLEMENT TO MR. J. V. WOODMAN'S CONSOLIDATED DIGEST OF INDIAN LAW CASES, 1836-1900.

COMPILED, UNDER THE ORDERS OF THE GOVERNMENT OF INDIA,

BY

C. E. GREY, B.A. (OXON.),

BARRISTER-AT-LAW AND EDITOR OF THE INDIAN LAW REPORTS.

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PREFACE.

THIS volume is published as a further supplement to Mr. J. V. Woodman's Consolidated Digest of Indian Law Cases, 1836-1900. It contains the cases published for the year 1905 in the Indian Law Reports Series, the Law Reports (Indian Appeals) and the Calcutta Weekly Notes.

Certain changes have been made, which are as follows:—

(1) for every case which is digested in this volume, the year in which the case was decided is given;

(2) wherever a case digested in this volume is published in two or more Reports (*e.g.*, I. L. R. Calc.; C. W. N.; and L. R. I. A.), the Report from which the head-note is taken is noted first, and the prefix s.c. is inserted before the references to the other Reports;

(3) the headings and sub-headings under which the cases are arranged are printed in the table in capitals and in black type, the sub-headings being in small capitals. The cross-references are printed in ordinary type.

C. E. GREY.

CALCUTTA;
The 1st September, 1907.

CONTENTS.

		Page
HIGH COURT, CALCUTTA	1905	v
HIGH COURT, MADRAS		v
HIGH COURT, BOMBAY		vi
HIGH COURT, ALLAHABAD		vi
MEMBERS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL		vii
TABLE OF REPORTS DIGESTED		viii
TABLE OF CASES IN THE DIGEST		ix
TABLE OF HEADINGS, SUB-HEADINGS AND CROSS-REFERENCES IN THE DIGEST		xxiii
DIGEST OF CASES		Col. 1

HIGH COURT, CALCUTTA, 1905.

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HIGH COURT, MADRAS, 1905.

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HIGH COURT, BOMBAY, 1905.

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HIGH COURT, ALLAHABAD, 1905.

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TABLE OF REPORTS DIGESTED.

Reports	Period	No. of Volumes	In what Court	Abbreviation
Indian Law Reports —	1905			
Calcutta Series, Vol 32		1	High Court, Calcutta, and Privy Council.	I L R Calc
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Calcutta Weekly Notes, Vo. 9		1	High Court, Calcutta and Privy Council.	C W N
Law Reports, Indian Appeals, Vols. 31, 32		1	Privy Council . . .	L. R. I. A.

TABLE

OF

CASES IN THE DIGEST.

Name of Case.	Volume and Page.	Column of Digest.
A		
Abdul Hai *v.* Nathu	I. L. R. 27 All. 183	355
Abdul Kareem Sahib *v.* Official Assignee of Madras	I. L. R. 28 Mad. 168	189
Abdul Karim Sahib *v.* Budrudeen Sahib	I. L. R. 28 Mad. 216	218
Abdul Menon *v.* Panduranga Row	I. L. R. 28 Mad. 255	110
Abdul Quayyum *v.* Sadrud-din Ahmad	I. L. R. 27 All. 403	344
Abdul Rashid Khan *v.* Dilshuk Rai	I. L. R. 27 All. 517	349
Abdul Razzaq *v.* Rahamat-Ullah	I. L. R. 27 All. 630	118
Abdulla Sahib *v.* Oosman Sahib	I. L. R. 28 Mad. 224	55
Abinash Chandra Chatterjee *v.* Paresh Nath Ghose	9 C. W. N. 402	135
Abinash Chandra Majumdar *v.* Hari Nath Saha	I. L. R. 32 Calc. 62 : 9 C. W. N. 25.	166, 176
Achal Ram *v.* Karim Husain Khan	I. L. R. 27 All. 271	357
Advocate General *v.* Karmali	I. L. R. 29 Bom. 133	290, 361
Advocate General of Bombay *v.* Hormusji	I. L. R. 29 Bom. 375	124, 350, 360
Ahmad-ul-lah Khan *v.* Salar Bakhsh	I. L. R. 27 All. 403	344
Ahsan-ullah *v.* Dakkhini Din	I. L. R. 27 All. 575	54
Aiyappa Reddi *v.* Kuppusami Reddi	I. L. R. 28 Mad. 20	237, 262
Aiyavu Mooppan *v.* Sawminatha Karundan	I. L. R. 28 Mad. 236	315
Ajab Lal Khinher *v.* Emperor	I. L. R. 32 Calc. 783 : 9 C. W. N. 810.	99, 108
Ajajuddin Alli Khan *v.* Secretary of State for India	I. L. R. 28 Mad. 69	153
Ajoy Kumari Debi *v.* Manindra Nath Chatterjee	I. L. R. 32 Calc. 561	6
Akula Paradesi *v.* Dhelli Jagannadha Row	I. L. R. 28 Mad. 157	74, 304
Alayakammal *v.* Subbaraya Goundan	I. L. R. 28 Mad. 493	240.
Algarasawmi Tevan *v.* Emperor	I. L. R. 28 Mad. 304	281
Ali Akbar *v.* Khurshed Ali	I. L. R. 27 All. 695	16, 83, 315
Alimunnissa Chowdhurani *v.* Shyama Charan Roy	9 C. W. N. 466	43
	I. L. R. 32 Calc. 749	43, 310
Alingal Kunhinayan *v.* Emperor	I. L. R. 28 Mad. 454	276
Amar Chandra Kundu *v.* Asad Ali Khan	I. L. R. 32 Calc. 908	122
Ambalavana Pandara Sannadhi *v.* Secretary of State for India.	I. L. R. 28 Mad. 539	84
Amerchand Madhowji, *in re*	I. L. R. 29 Bom. 188	8, 145, 354
Amir Ali *v.* Razia Bibi	9 C. W. N. 876	254
Amrita Bibee *v.* Kanhai Lall Agarwalla	I. L. R. 32 Calc. 448 : 9 C. W. N. 239.	7, 352
Amrita Lal Bagchi *v.* Jatindra Nath Chowdhry	I. L. R. 32 Calc. 165	240
Amrita Nath Mitter *v.* Abhoy Charan Ghosh	9 C. W. N. 370	83, 222
Amrita Shaha *v.* Panch Kori Shaha	9 C. W. N. 418	53
Amulya Charan Sen *v.* Kali Das Sen	I. L. R. 32 Calc. 861	181
Anandrav Vinayak *v.* Secretary of State for India	I. L. R. 29 Bom. 565	30
Anderson *v.* Hardut Roy Chamaria	9 C. W. N. 543	127
Annamalay Chettiar *v.* Pitchu Ayyar	I. L. R. 28 Mad. 122	14, 77

Name of Case.	Volume and Page.	Column of Digest
Annoda Prasad Banerjee v. Nobo Kishore Roy	9 C. W. N. 952	188
Annoovri Sanyasi, in re	I. L. R. 28 Mad. 37	87
Apurba Krishna Roy v. Ashutosh Dutt	9 C. W. N. 122	24, 26, 212
Arumugam Chetti v. Raja Jagaveera Rama Venkateswara Ettapa	I. L. R. 28 Mad. 444	60, 308
Asad-ulla v. Muhammad Nur	I. L. R. 27 All. 459	17
Ashok Bhuiyan v. Karim Biparı	9 C. W. N. 843	214
Atmaram Gangji v. Balkrishna Mahadji	I. L. R. 29 Bom. 615	145
Atul Krishna Sircar v. Sanyasi Churn Sircar	I. L. R. 32 Calc. 1057 : 9 C. W. N. 784.	182
Ayseri Lal v. Ram Bhajan Lal	I. L. R. 27 All. 602	211
Azgar Ali v. Asaboddin Kazi	9 C. W. N. 134	53

B

Baburam Rai v. Emperor	I. L. R. 32 Calc 775 : 9 C. W. N. 607.	282
Bagdu Majhi v. Durga Prosad Singh	9 C W. N. 232	291
Bai Gungabai v. Bhugwandas Valji	9 C. W. N. 769 : L. R. 32 I. A. 142	*361, 363*
Bai Meherbai v. Maganchand	I. L. R 29 Bom. 96	57, 355
Bai Motivaboo v. Purshotam Dayal	I. L. R. 29 Bom. 306	183
Balaram v. Ram Krishna	I. L. R. 29 Bom. 366	323
Balleo Prasad v. Ibn Haidar	I. L. R. 27 All 625	347
Balmakund v. Kundun Kunwar	I. L. R. 27 All. 452	326
Balvant Ramchandra v. Secretary of State for India	I. L. R. 29 Bom. 480	236, 312, 285, 334, 355, 357
Banh Lal v. Manni Lal	I. L. R. 27 All. 450	348
Banomali Roy Bahadur v. Jagat Chandra Bhowmic	I. L. R. 32 Calc. 669 : 9 C. W. N. 673 . L. R. 32 I. A. 80.	234
Barka Chandra Dey v. Janmenjoy Dutt	I. L. R. 32 Calc. 948	322
Basappa v. Ragava	I. L. R. 29 Bom. 91	259
Bepin Behari Mitter v. Lala Bhagwat Sahai	9 C. W. N. 689	276
Berham Deo Pershad v. Tara Chand	9 C. W. N. 989	265
Bhagwati Sahai v. Emperor	I. L. R. 32 Calc. 664	276, 299
Bhavadasan v. Narayana Samayajipad	I. L. R. 28 Mad. 202	324
Bhola Mahto v. Emperor	9 C. W. N. 125	276
Bhugwandas Khettry v. Nilkanto Ganguly	9 C. W. N. 171	71
Bideshar Jha v. Srikishen Jha	9 C. W. N. 105	298
Bijoy Chand Mahatap v. Atalya Charan Bose	I. L. R. 32 Calc. 953	317
Birendra Lal Bhaduri v. Emperor	I. L. R. 32 Calc. 22	283
Bishambhar Das v. Drigjibai Singh	9 C. W. N. 914 : L. R. 32 I. A 172.	264
Bireswar Roy v. Durga Das Mehara	I. L. R 32 Calc. 418	336
Bombay, Burma Trading Corporation v. Dorabji	I. L. R. 29 Bom. 126 ; L. R. 32 I. A. 39	85, 297
Bonnaul v. Charriol	I. L. R. 32 Calc. 631	278, 294
Bulli Kunwar v. Mussammat Bhagirathi	9 C. W. N. 649	360

C

Cassem Kurrim v. Jonas Hajee Seedick	9 C. W. N. 195	123

Name of Case.	Volume and Page.	Column of Digest.
Chaitanya Gobinda Pujari Adhikari *v.* Dayal Gobinda Adhikari.	I. L. R. 32 Calc. 1082, 9 C. W. N. 1021.	295, 362
Chandra Gajapati Narain Deb *v.* Mukunda Deb	9 C. W. N. 710	343
Chandra Kali Dassee *v.* Chapman	I. L. R. 32 Calc. 799	368
Chandu Lal Suklal *v.* Sidruthrai	I. L. R. 29 Bom. 291	294, 360
Chatarpal *v.* Jagram	I. L. R. 27 All. 411	98
Chatterputt Singh *v.* Maharaj Bahadur	I. L. R. 32 Calc. 108 : 9 C. W. N. 225 : L. R. 32 I. A. 1.	247, 342
Chaturbhuj *v.* I. T. Bennett	I. L. R. 29 Bom. 157	151, 208
Chet Ram, *in re*	I. L. R. 27 All. 623	100
Chethru Gope *v.* Sricharan Bhagat	9 C. W. N. 420	53
Chettikulam Venkitachala Reddiar *v.* Chittekulam Kumara Venkitachala Reddiar.	I. L. R. 28 Mad. 377	169
Chhedi *v.* Chhedan	I. L. R. 32 Calc. 42	314
Chinnathambi Mudali *v.* Sella Gurusawmy Chetty	I. L. R. 28 Mad. 310	313
Churamani Dasi *v.* Baidya Nath Naik	I. L. R. 32 Calc. 473	167, 337
Chotalal Mohant *v.* Lallubhai Surchand	I. L. R. 29 Bom. 157	187, 222
Chotalal *v.* Nabibhai	I. L. R. 29 Bom. 528	67, 302
Chuni Lal *v.* Jugul Kishore	I. L. R. 29 All. 132	68
Collector of Kaira *v.* Chunilal	I. L. R. 29 Bom. 161	96, 221
Corporation of Calcutta *v.* Shyama Charan Paul	I. L. R. 32 Calc. 277	35, 226

D

Dambar Koeri *v.* Rai Sham Kissen Das	9 C. W. N. 703	65
Damodar Das *v.* Girdhari Lal	I. L. R. 27 All. 564	305
Darbai Panjiara *v.* Beni Rai	I. L. R. 32 Calc. 1014	272
Dasharathi Kundu *v.* Bepin Behari Kundu	I. L. R. 32 Calc. 261 : 9 C. W. N. 119.	176
Debi Pershad Chowdhry *v.* Radha Chowdhrain	I. L. R. 32 Calc. 84 : 9 C. W. N. 164 : L. R. 31 I. A. 160.	132
Delaney *v.* Rohamat Ali	I. L. R. 32 Calc. 710	133
Deonandan Singh *v.* Manbodh Singh	I. L. R. 32 Calc. 111	318
Dhan Devi *v.* Zamurrad Begam	I. L. R. 27 All. 440	67
Dhani Ram *v.* Bhola Singh	I. L. R. 27 All. 21	9
Dina Nath Roy *v.* Krishna Bejoy Saha	9 C. W. N. 379	206
Dinendranath Mullick, *in re*	9 C. W. N. 221	188, 239
Dinesh Proshad *v.* Shankar Chowdhry	9 C. W. N. 981	147
Dinkar *v.* Narayan	I. L. R. 29 Bom. 357	127, 315
Dowlat Ram *v.* Emperor	I. L. R. 32 Calc. 43	339
Dular Koeri *v.* Dwarkanath Misser	I. L. R. 32 Calc. 284 : 9 C. W. N 270.	175, 177
Durga Das *v.* Gullu	I. L. R. 27 All. 87	336
Durga Pershad *v.* Dukhi Roy	9 C. W. N. 789	270, 344
Durga Prasad *v.* Puradar Singh	I. L. R. 27 All. 186	96

E

Ekcowrie Mukerjee *v.* Emperor	I. L. R. 32 Calc. 178	289
Emperor *v.* Abdul Hamid	I. L. R. 32 Calc. 759	338
——— *v.* Abdullah	I. L. R. 27 All. 496	278
——— *v.* Azizuddin	I. L. R. 27 All. 294	277
——— *v.* Balwant	I. L. R. 27 All. 293	101
——— *v.* Bazid	I. L. R. 27 All. 298	284

Name of Case	Volume and Page	Column of Digest
Emperor v. Bishen Das	I L R 27 All. 581	2-1
——— v. Comley	I L. R. 29 Bom 575	6, 115, 231
——— v. Ganeshi Lal	I L R. 27 All. 253	278
——— v. Ganga Persad	I L. R. 27 All 260	291
——— v. Ishaq Ahmed	I L. R. 27 All 69	113
——— v. Jagannath	I L R 27 All 486	114
——— v. Jonalagadda Venkatrayudu	I L R 29 Mad 565	277
——— v. Jethalal	I L R 29 Bom. 449	113
——— v. Jusub Ally	I. L. R 29 Bom 386	32, 155
——— v. Kallu	I. L. R. 27 All. 192	313
——— v. Lakhamsi	I. L. R. 29 Bom. 226	31, 154
——— v. Maula Baksh	I L. R. 27 All 28	291
——— v. Mohan Lal	I L. R. 27 All 25	118
——— v. Nadirsha	I L R 29 Bom 33	31
——— v. Nanha	I L. R. 27 All 33	119
——— v. Nathadeshwar	I L. R. 27 All 491	279
——— v. Powell	I. L. R. 27 All. 307	115, 151
——— v. Rameshar	I. L. R 27 All 300	284
——— v. Ramprasad	I L R 29 Bom 433	150
——— v. Saroda Prasad Chatterjee	I. L. R. 32 Calc 180	140
——— v. Shib Singh	I L. R. 27 All. 232	287
——— v. Tara Singh	I L. R 27 All 420	278
——— v. Udmi	I L. R. 27 All. 262	101
——— v. Wahid Masajt	I L. R. 29 Bom. 226	32, 155
——— v. Wallace Flour Mill Company, Ld.	I L. R 29 Bom. 193	31
Etyat Pocparambil Bava v. Matalakat Krishna Menon	I. L. R. 28 Mad 211	142, 246
Esra v. Secretary of State for India	I L. R. 32 Calc 605: 9 C. W. N. 454: L. R. 32 I. A. 200	203

F

Farzand Ali Khan v. Bismilla Begam	I L. R. 27 All. 23	274
Fazlunnessa v. Kamarunnessa	9 C. W. N 325	251
Fraser & Co. v. Bombay Ice Manufacturing Company	I L. R. 29 Bom. 107	2, 8, 80, 120, 312
Furmand Ali v. Mohanth Lal Puri	I L. R. 32 Calc 268	94

G

Ganga Baksh v. Jagannath	I L. R. 27 All. 305	304
Ganga Ram v. Kanhaiya Lal	I L. R. 27 All. 254	347
Gendan Lal v. Abdul Aziz Khan	I L. R. 27 All. 352	293
Ghaneshyam Misser v. Padmanand Singh	I. L. R. 32 Calc. 336: 9 C. W. N 610	303
Girindra Chandra Pal Chowdhry v. Sreenath Pal Chowdhry	I. L. R. 32 Calc. 567	200
Girwar Singh v. Sitaman Singh	I L. R. 32 Calc 1000: 9 C. W. N. 847.	334
Gobind Prasad v. Inayat Khan	I. L. R. 27 All. 310	129
Godai Shaha v. Emperor	9 C. W. N 1030	193
Godu Ram v. Surajmal	I L. R. 27 All. 378	144
Golab Sao v. Chowdhry Madho Lal	9 C W. N. 937	225
Gopal Chandra Chakravarti v. Preonath Dutt	I. L R. 32 Calc. 75	226
Gopal Chandra Das v. Hara Sundari Dasi	9 C. W N 3-3	328

Name of Case.	Volume and Page.	Column of Digest.
Gopal Prosad Bhaka *v.* Rajah Debya Singh Deb	I. L. R. 32 Calc. 158	167
Gopal Prosad Bhakat *v.* Raghunath Deb	I. L. R. 32 Calc. 158	167
Gopi Narain Khanna *v.* Babu Bansidhar	9 C. W. N. 577 : L. R. 32 I. A. 123.	346
Gopu Kolandavelu Chetty *v.* Sami Royar	I. L. R. 28 Mad. 517	351
Gour Chandra Gajapati Narayan Das *v.* Makunda Deb	9 C. W. N. 710	264, 341
Gour Chandra Saha *v.* Mani Mohan Sen	I. L. R. 32 Calc. 463	213
Goura Chandra Gajapatti Narayana Deo Maharajaulun Garu *v.* Secretary of State for India.	9 C. W. N. 553 : I. L. R. 28 Mad. 130 : L. R. 32 I. A. 53.	154
Gouri Krishna *v.* Sabanunda Sarma	I. L. R. 32 Calc. 1036	194
Govinda Pillai *v.* Thayammal	I. L. R. 28 Mad. 57	227, 332
Grish Chandra Chandoo *v.* Srish Chandra Das	9 C. W. N. 255	214
Gulraj Marwari *v.* Shaik Bhatoo	I. L. R. 32 Calc. 796	197
Gungadhur *v.* Parashram	I. L. R. 29 Bom. 300	338
Guru Prosunno Lahiri *v.* Jotindra Mohan Lahiri	I. L. R. 32 Calc. 963 : 9 C. W. N. 568.	221

H

Haidar Ali *v.* Abru Mia	I. L. 32 Calc. 756 : 9 C. W. N. 971.	122, 285
Haidar Husain Khan *v.* Faghfur Mirza	9 C. W. N. 817 : L. R. 32 I. A. 135.	351
Hajee Ismail Sait *v.* Company of Messageries Maritimes of France.	9 C. W. N. 748	49
Hajee Hasum *v.* Chuni Lal	I. L. R. 29 Bom. 360	259
Haladhar Bhumij *v.* Sub-Inspector of Police, Hura outpost.	9 C. W. N. 199	108
Hamid Hossein *v.* Mukhdum Reza	I. L. R. 32 Calc. 229 : 9 C. W. N. 300.	319
Hans Raj *v.* Ratni	I. L. R. 27 All. 200	14, 82
Har Persad Lal *v.* Dal Mardan Singh	9 C. W. N. 723	264, 266
Har Prasad *v.* Jagan Lal	I. L. R. 27 All. 56	67
Hara Charan Mukerjee *v.* Emperor	I. L. R. 32 Calc. 367 : 9 C. W. N. 3664.	116, 192
Hara Kumar Pal Chowdhury *v.* Shaikh Sofatullah	9 C. W. N. 844	52
Hara Sundar Majumdar *v.* Basanta Kumar Roy	9 C. W. N. 154	128, 322
Hara Sundari Debya *v.* Jogendra Nath Mazumdar	9 C. W. N. 387	210
Harek Chand Babu *v.* Bejoy Chand Mahatab	9 C. W. N. 795	230
Harendra Lal Roy Chowdhry *v.* Uma Charan Ghosh	9 C. W. N. 934	151
Hari Bhuimali *v.* Emperor	9 C. W. N. 974	280
Hari Charan Fadikar *v.* Hari Kar	I. L. R. 32 Calc. 459 : 9 C. W. N. 376.	236
Hari Sankar Dutt *v.* Kali Kumar Patra	9 C. W. N. 690	94
Hari Sanker Dutt *v.*—	I. L. R. 32 Calc. 734	198
Harihar Lal *v.* Gunendar Pershad	9 C. W. N. 1025	28
Harihar Ojha *v.* Dasarathi Misra	9 C. W. N. 636	168
Harilal Bapuji *v.* Bai Mani	I. L. R. 29 Bom. 351	146, 353, 180
Harnam Chandar *v.* Muhammed Yar Khan	I. L. R. 27 All. 485	61
Hart *v.* Grosser	9 C. W. N. 748	49
Hassan Ali *v.* Gobinda Lal	9 C. W. N. 141	23
Hays *v.* Padmanand Basak Singh	I. L. R. 32 Calc. 118	233, [illegible]
Hem Chandra Chowdhury *v.* Jagadindra Nath Roy	9 C. W. N. 934	151
Hemanta Kumari *v.* Banku Behari Sikdar	9 C. W. N. 791	84, 120
Hemendra Nath Mookerjee *v.* Kumar Nath Roy	9 C. W. N. 96	214, 226

Name of Case	Volumes and Page	Column of Digest
Hiranand Ojha v Emperor	9 C W N 933	102 279
Horanand Banerjee v Ananta Das	9 C W N 493	20
Hukam Singh v Paghuhir Saran	I. L. R. 27 All 700	66
I		
Ibrahim Khan Sahib v Rangasami Naicker	I L R 28 Mad 490	248
Idarat Khan v Ilahi Bakhsh	I L R 27 All 78	248 286
Inayat Singh v Imtiaz un nissa Begum	I L R 27 All 97	26
Ismail bin Shaik Badal v Al Bhoy Sarafali	9 C W N 591	92
Ismail Khan v Abdul Aziz Khan	I L R. 32 Calc 602 9 C W N 343	318 320
Ismail Khan Mahomed v Hari Charan Pal	9 C W N 60	53
J		
Jadunath Prasad v Gridhar Das	I L R 27 All. 513	351
Jafar Mandal v Jaibullah Saha	9 C W N 551	101
Jagadindra Nath Roy v Hemanta Kumar Debi	I L R 31 Calc 129 : L R. 31 I A 203	230
Jagannath v Bhawani	I L R 27 All. 167	10
Jagannatha Charry v Rama Rayer	I L R 28 Mad 268	329
Jagar Nath Singh v Jai Nath Singh	I L R. 27 All 88	191
Jaggi Lal v S r W E Cooper	I L R 27 All 606	328
Jahan Ara Begum v Mirza Shujauddin Bukht Bahadur	9 C W N 880	319
Jai Singh Pal Singh v Bijoy Pal Singh	I L R 27 All 417	164
Jamna Das v Ramanta Pande	I L R 27 All. 364	179
Jarao Kumari v Basanta Kumar Roy	I L R. 32 Calc. 374	91
Jitmand v Ramchand	I L R 29 Bom 405	189
Jivraj v Babaji	I L R 29 Bom 68	279
Jnanada Sundari Chowdhran v Atul Chandra Chakravart	I L R 32 Calc 972	27, 143
Jog Deb Singh v Mahomed Afzal	I L R 33 Calc 982 9 C W N 876	253 191
Jogendra Narayan Roy v Crawford	I L R. 32 Calc. 1141	191
Jogendra Nath Mookerjee v Sarat Chandra Banerjee	I L R 33 Calc 351	109 393
Jogendra Nath Singh v Kal Charan Roy	9 C W N 863	156
Johnson v Madras Railway Company	I L R 28 Mad 479	151 2 3
Jonab Ali v Rakibuddin Mallik	9 C W N 571	40
Jotindra Mohan Tagore v Mahomed Basir Chowdhry	I L R 3 Calc 332	18
——— v Bijoy Chand Mahatap	I L R 32 Calc 433	274
Joy Chandra Banerjee v Sreenath Chatterjee	I L R 32 Calc. 357	131
Jumna Bai Ranee Sahib v Soma Sundaram	I L R 28 Mad 553	215
Jyot Kumar Mukerjee v Hari Das Mitter	I L R 32 Calc 1016	20 63
Jyotish Chandra Mukerjee v Ramanath Bhadra	I L R 31 Calc 243	218
K		
Kach Kaltana v Pengappa	I L R 28 Mad. 182 s.c L. R. 32 I A. 261	172
Kalabhai v Secretary of State for India	I L R 29 Bom 192	124 196 286

Name of Case.	Volume and Page.	Column of Digest.
Kalakka Thola Udayar *v.* Kachi Yuva Rangappa Kalakka Thola Udayar.	I. L. R. 28 Mad. 508	172
Kali Das Chuckerbutty *v.* Ishan Chander Chuckerbutty	9 C. W. N. 49	361
Kali Kinkar Sett *v.* Dinobandhu Nandy	I. L. R. 32 Calc. 379 : 9 C. W. N. 321.	109
Kamar-u-din Ahmad *v.* Jawahir Lal	I. L. R. 27 All. 334 : L. R. 32 I. A. 102.	148, 244
Kamatchi Nathan Chetty *v.* Emperor	I. L. R. 28 Mad. 308	279
Kandasamy Chetty *v.* Annamalai Chetty	I. L. R. 28 Mad. 61	226
Kanhai Lal *v.* Kalka Prasad	I. L. R. 27 All. 670	292
Karan Singh *v.* Bhup Singh	I. L. R. 27 All. 16	169
Karoonamoyee Dabee *v.* Administrator General of Bengal.	9 C. W. N. 651	174
Kashi Gir *v.* Jogendro Nath Ghose	I. L. R. 27 All. 138	349
Kavasji *v.* Hormasji	I. L. R. 29 Bom. 73	288
Kenath Puthen Vithil Tavazhi *v.* Narayanan	I. L. R. 28 Mad. 182	256
Khatun Bibi *v.* Savida Bibi	I. L. R. 27 All. 457	291
Khaver Sultan *v.* Rukhia Sultan	I. L. R. 29 Bom. 468	252
Khetrapal Singh Roy *v.* Shyama Prosad Barman	I. L. R. 32 Calc. 265	138
Khiarajmal *v.* Daim	I. L. R. 32 Calc. 296 : L. R. 32 I. A. 23.	269
Khoda Bux *v.* Bakeya Mundari	I. L. R. 32 Calc. 941	281
Khuda Bakhsh *v.* Alim-un-nissa	I. L. R. 27 All. 313	268
Khurkun Saha *v.* Dhatia Das	I. L. R. 32 Calc. 1145	393
Kirat *v.* Debi Singh	I. L. R. 27 All. 308	263
Kishori Lal Chatterjee *v.* Emperor	9 C. W. N. 764	282
Konchadi Shanbhogue *v.* Shiva Rao	I. L. R. 28 Mad. 54	342
Konduru Ranga Reddi *v.* Subbiah Setty and Kumbahala Subbamma.	I. L. R. 28 Mad. 394	324
Korban *v.* Emperor	I. L. R. 32 Calc. 444	199
Kotamraju Venkatrayadu *v.* Emperor	I. L. R. 28 Mad. 90	284
Krishna Chandra Saha *v.* Bhairab Chandra Saha	I. L. R. 32 Calc. 1077 : 9 C. W. N. 868.	234
Krishna Govinda Dutt, *in re*	9 C W. N. 859	115
Krishna Kant Saha *v.* Krishna Chandra Roy	9 C. W. N. 303	130
Krishnamarazu *v.* Marraju	I. L. R. 28 Mad. 495	128, 133
Kundan Lal *v.* Faqir Chand	I. L. R. 27 All. 75	345
Kurnam Butchayya *v.* Secretary of State for India	I. L. R. 28 Mad. 551	250

L

Lakmichand *v.* Jai Kuverbai	I. L. R. 29 Bom. 170	146, 354
Lakshmakka *v.* Nagi Reddi	I. L. R. 28 Mad. 500	51
Lakshmana Sasamalla *v.* Siva Sasamalayani	I. L. R. 28 Mad. 425	184
Lakshmi Narayan Dutta *v.* Inspector, Ureagan	9 C. W. N. 597	117
Lakshmibai *v.* Vishnu Vasudev	I. L. R. 29 Bom. 401	164
Lakshmishankar *v.* Raghumal	I. L. R. 29 Bom. 29	64
Lal Achal Ram *v.* Kazim Husain Khan	9 C. W. N. 472 : L. R. 33 I. A. 113 : I. L. R. 27 All. 271.	314
Lal Gopal Dutt *v.* Manmatha Lal Dutt	I. L. R. 32 Calc. 258	190
Lal Gopal Dutta Chowdhry *v.* Manmatha Lal Dutta Chowdhry.	I. L. R. 32 Calc. 258 : 9 C. W. N. 175.	24
Latchmanan Chetty *v.* Ramanathan Chetty	I. L. R. 28 Mad. 127	15, 63, 244
Linga Reddy *v.* Hussain Reddy	I. L. R. 28 Mad. 117	60
Loke Nath Misra *v.* Dasarathi Tewari	I. L. R. 32 Calc. 102	42

Name of Case	Volume and Page	Column of Digest
Lucas v Theodoras Lucas	I L R 32 Calc 187 9 C W N 567	259
M		
Ma Me Gale v Ma Sa Yi	I L R 32 Calc 219	35
MacMochi v Lee Chin	9 C W N 594	76, 300
Madari v Baldeo Prasad	I L R 27 All 351	125
Madden v A J Bridge	9 C W N 9	353
Madhabi Sundari Dasya v Gaganendra Nath Tagore	9 C W N 111	13, 138
Madhava Singh, in re	I L R 32 Calc 1 L R 31 I A 239	224
Madhu Sudan Sen v Kamini Kanta Sen	9 C W N 895	15
Mahadevappa v Basagawda	I L R 24 Bom 346	79 82 209
Mahammadunnissa Begum v Bachelor	I L R 29 Bo 4 8	166
Mahammed Kasem v Naffar Chandra Pal Chowdhry	I L R 32 Calc 911	157, 252
Maharaja of Benares v Ramj Khan	9 C W N 803	26
Mahesh Narain v Nowbat Pathak	I L R 27 All 138	331
Mahesh Prasad v Ranjor Singh	I L R 32 Calc 837	92
Mahip Rai v Dwarka Rai	I L R 27 All 163	46
Mahomed Kazem v Naffar Chundra Pal Chowdhry	I L R 27 All 453	69
Mahomed Wahib v Mahomed Ameer	I L R 32 Calc 911	238 316
Malki Kunwar v Imam ud-din	I L R 27 All 59	45
Mallika Dassi v Makhan Lal Chowdhry	9 C W N 928	207
Manager of Court of Wards, Kalahasti estate v Ramasami Reddi	I L R 23 Mad 437	81, 309
Manjan Bibee v Khadem Hossein	I L R 32 Calc 273	315
Manik Lal Seal v Banamali Mukerjee	I L R 32 Calc 1104	139
Manilal Hargovandas v Vanmalidas Amratlal	I L R 29 Bom 621	334
Maniudra Chandra Nandy v Jamahir Kumari	I L R 32 Calc 643 9 C W N 670	90, 92
Manki v Bhagwanti	I L R 27 All 415	114
Manmatha Nath Biswas v Rohini Moni Dasi	I L R 27 All 406	331
Manpal v Sahib Ram	I L R 27 All 514	210
Mardan Singh v Thakur Sheo Dayal	I L R 27 All 519	345
Martin in re	I L R 27 All 296	107
Mata Din v Jamna Das	I L R 27 All 691	78, 307
Matukdhari Tewari v Hari Madhav Das	9 C W N 72	102
Maturi Subbayya v Kola Krishnayya	I L R 28 Mad 207	48
——— v Kota Krishnayya	I L R 28 Mad. 227	195
Maung Shwe Oh v Maung Tun Gyaw	I L R 32 Calc 93 9 C W N 147 L R 31 I A 188	87, 121, 135
Meenakshi Ginning and Pressing Company v Myle Sreeramulu Naidu	I L R 28 Mad 19	49
Menat Ali v Amdar Ali	9 C W N 605	54
Mian Jan v Abdul	I L R 27 All 572	99
Mihin Lal v Badri Prasad	I L R 27 All 436	9
Mir Sadrudin v Nurudin	I L R 27 Bom 79	148
Mirza Kuratulain v Nuzatu-dowla Abbas Hossain Khan	9 C W N 938 L R 32 I A 244	44 255
Mithu Khan, in re	I L R 27 All 172	101
Mohit Lal Dutt v Raj Narain Dutt	9 C W N 537	231
Mon Mohini Ghose v Parvati Nath	I L R 32 Calc 746	275

Name of Case.	Volume and Page.	Column of Digest.
Moni Chandra Chuckrabutty *v.* Baikanta Nath Biswas	9 C. W. N. 858	205
Monijan Bibee *v.* Khadem Hossein	9 C. W. N. 151	76, 299
Monmotho Nath Dutt *v.* Chairman of Cossipore-Chitpore Municipality.	9 C. W. N. 736	207
Moosabhai *v.* Yacoobhai	I. L. R. 29 Bom. 267	232, 254, 352
Mothi Rungaya Chetty *v.* Secretary of State for India	I. L. R 28 Mad. 213	325
Motichand *v.* Sagun	I. L. R. 29 Bom. 46	305
Motilal Ghose *v* Secretary of State for India	9 C. W. N. 495	339
Motilal Premsuk *v* Kanwal Lal Dass	I. L. R. 32 Calc. 969	339
Mubarak Hossain *v.* Kaniz Banoo	I. L. R. 27 All. 160	253, 293
Muhammad Rahmat-ullah *v.* Bachho	I. L. R. 27 All. 537	69
Mulji Virji *v.* Bangabasi Saha	9 C. W. N. 502	220
Munawar Ali *v.* Razia Bibi	I. L. R. 27 All. 320	254
Municipal Corporation of Bombay *v.* Secretary of State for India.	I. L. R. 29 Bom. 580	203
Munni Sonar *v.* Emperor	9 C. W. N. 438	280
Murullah *v.* Barullah	9 C. W. N. 972	214
Musa Yakub *v.* Maulal	I. L. R. 29 Bom. 368	37, 194
Mustafa Khan *v.* Phulja Bibi	I. L. R. 27 All. 526	75
Mylne, *in re*	9 C. W. N. 986	135

N

Nabi Muhammad *v.* Jwala Prasad	I. L. R. 27 All. 148	45
Najemoddin Moonshi *v.* Hassan Hyder Chowdhry	9 C. W. N. 852	319
Nand Ram *v.* Ram Prasad	I. L. R. 27 All. 145	53
Nanda Lal Mukerjee *v.* Kymuddin Sardar	9 C. W. N. 886	27
Nandhu Mondal *v.* Kartick Mondal	9 C. W. N. 56	208, 226
Narain Mahto *v.* Tekait Brojo Behari Singh	9 C. W. N. 472	24
Naraina Naika *v.* Vasudeva Bhatta	I. L. R. 28 Mad. 369	209, 350
Narayan *v.* Laxuman	I. L. R. 29 Bom. 42	306
Narayana Pattar *v.* Gopala Krishna Pattar	I. L. R. 28 Mad. 355	149
Narayanan Chetty *v.* Kommammal Achi	I. L. R. 28 Mad. 338	241, 310
Narayana-sami Naick *v.* Mangammal	I. L. R. 26 Mad. 315	165
Narayana-sami Pillai *v.* Esa Abbayi Sait	I. L. R 28 Mad. 351	145
Narasinha Chari *v.* Gopala Ayyangar	I. L. R. 28 Mad. 391	170
Narendra Lal Khan *v.* Jogi Hari	I. L. R. 32 Calc. 107	40
Narsing Narain Singh *v.* Dharam Thakur	9 C. W. N. 144	206
Nawab Begum *v.* Creet	I. L. R. 27 All. 676	329
Nawab Khaja Solemollah Bahadur *v.* Ishan Chandra Das Sarkar.	9 C. W. N. 909	105
Nawbut Pattak *v.* Mahesh Narayan Lal	I. L. R 32 Calc. 654	336
Nazir Hassan *v.* Shibba	I. L. R. 27 All. 81	203
Nepal Rai *v.* Debi Prasad	I. L. R. 27 All. 447	95
Nibaran Chandra Chowdhry *v.* Chiranjib Prasad Bose	I. L. R. 32 Calc. 512 : 9 C. W. N. 487.	320
Nilmoney Dey Sarkar, *in re*	I. L. R 32 Calc. 143	254, 352
Nilratan Mondal *v.* Ismail Khan Mahomed	I. L. R. 32 Calc. 51 : L. R. 31 I. A. 149.	205
Nim Chand Banoo *v.* Ashutosh Dutt	9 C. W. N. 117	344
Nirabai, *in re*	I. L. R. 29 Bom. 203	333
Nitya Lal *v.* Beni Madhab Ghose	9 C. W. N. 632	14, 114
Nittyanand Roy *v.* Poresh Nath Sen	I. L. R. 32 Calc. 771 : 9 C. W. N. 621.	197 104, 106

Name of case	Volume and Page.	Column of Digest
Nityanand Kanarar v Emperor	9 C W N 619	118
Nobin Chand Naskar v Raj Koomar Sarkar	9 C W N 1001	285 343
Nobin Kali Debi v Banalati Debi	I L. R. 32 Calc 921	14 200
Nur Muhammad v Ayesha Bibi	I L R 27 All 483	117, 359
Nurjahan Begam v Paghfar Mirza	I L R 27 All. 383	126
P		
Pachiappa Achari v Poojali Seenan	I L R 28 Mad. 557	140 245
Padmanand Singh v Radha Singh	9 C W N 469	43, 311
Pahlwan Singh v Ram Bharose	I L R 27 All 169	287
Panangupalli Sertharamaya v Nanduri Ramachendradu.	I L R 28 Mad 152	70, 188
Parambath Manakkal v Pothenghatil Mussamut	I L R 28 Mad 406	47
Parmanand v Lokman Das	I L R 27 All 392	253
Parsath Nath Tewari v Dhanai Ojha	I L. R. 33 Calc 988	203, 290
Parsidh Narain Singh v Ghaneshyam Narain Singh	9 C W N 373	75
Parvatibai v Vishvanath	I L. R 29 Bom 207	36 330
Paru v Variangattil Raman Menon	I L R 28 Mad 359	70
Parvatibai v Vishvanath Ganesh	I L. R. 29 Bom 207	86
Pasupathi Ayyar v Kothanda Rama Ayyar	I L R 28 Mad 64	56
Peary Mohan Mukerjee v Norendra Nath Mukerjee	I L R 32 Calc 582 9 C W N 422	64 90, 144 274
Peer Mahomed v Mahomed Ebrahim	I L. R 29 Bom 234	98 199, 327, 330
Peru v Variangattil Raman Menon	I L. R. 28 Mad 359	229
Port Canning and Land Improvement Company v Dharanidhar Sardar	9 C W N 618	74
Prafulla Chunder Mullick v Jogendra Nath Sreemany	9 C W N 528	129
Pramatha Nath Gangooly v Khetra Nath Banerjee	1 L. R 32 Calc 270 : 9 C W N 247	303
Pran Nath Sarkar v Jadu Nath Saha	I L. R. 32 Calc 729 9 C. W N 697	261, 313
Prayag Doss Ji Varu Mohant v Tirumala Sriranga Charlavaru	I L R 28 Mad. 319	77, 353
Prayag Mahaton v Gobind Mahaton	I L. R 32 Calc. 602 9 C. W N 862	107, 197
Prem Chand Das v Surendra Nath Saha	9 C. W N 190	295
Prem Chand Singh Roy v Dharmadas Singh Roy	9 C W N 392	103
Probodh Lal Kundu v Harish Chandra Dey	9 C W N 303	183
Promoda Nath Roy v Pamoni Kanto Roy	9 C W N 34	24
——— v Sarat Gobindo Chowdhury	9 C. W N 463	210, 217
Protap Chandra Chatterjee v Durga Charan Ghose	9 C W N 1061	77, 242
Protap Chandra Das v Biseswar Pramanick	9 C. W N 416	23
Pullianappally Sankaran Nambudri v Vittil Thalakat Muhammad	I L. R 28 Mad. 505	242, 302
Puliyampatti Naranier v Kuppier	9 C W N 89	19
Pydigantam Jogannadha Row v Pam Dass Patnaik	I L R 28 Mad 197	167, 240
Q		
Quayyum Ali v Fayaz Ali	I L. R 27 All. 359	114

Name of Case.	Volume and Page.	Column of Digest.
R		
Radha Kishore Manikya v. Durga Nath Bhuttacherjee	I. L. R. 32 Calc. 162	25, 196
Radha Raman Ghose v. Baliram	I. L. R. 32 Calc. 249	276
Raghunandan Pershad v. Emperor	I. L. R. 32 Calc. 80	10)
Raghunath v. Ganpatji	I. L. R. 27 All. 374	54
Raghunath Das v. Secretary of State	I. L. R. 29 Bom. 524	12, 30
Rahimuddin v. Ram Lal	I. L. R. 27 All. 155	61
Rai Meherbhai v. Maganchand	I. L. R. 29 Bom. 96	94
Raghubans Sahai v. Phool Kumari	I. L. R. 32 Calc. 1130	298
Rahimbux v. Abdul Kader	I. L. R. 32 Calc. 537	235
Raj Bahadur v. Bharat Singh	I. L. R. 27 All. 348	225
Rajaya v. Balkrishna Gangadhur	I. L. R. 29 Bom. 415	129, 186
Raj Chandra Roy v. Fazijuddin Hossain	I. L. R. 32 Calc. 716	236
Raj Indra Bahadur Singh v. Rani Raghubans Kunwar	9 C. W. N. 1009	158
Raj Kumar Majumdar v. Prabad Chandra Ganguly	9 C. W. N. 656	301
Raj Narain Mitter v. Budh Sen	I. L. R. 27 All. 338	204
Raja of Vizianagram v. Dantivada Chettiah	I. L. R. 27 Mad. 84	250
Rajaya v. Balkrishna Gangadhur	I. L. R. 29 Bom. 416	216
Rajendra Narayan Roy v. Mahomed Arzumand Khan	9 C. W. N. 887	103
Rajendra Nath Banerjee v. Secretary of State for India	I. L. R. 32 Calc. 343	356
Rakhit Mahanta v. Puddo Bauri	9 C. W. N. 54	28, 78
Ram Bahadur Pal v. Ram Shankar Prasad Pal	I. L. R. 27 All. 683	81, 258
Ram Bhajan Kunwar v. Guru Charan Kunwar	I. L. R. 27 All. 14	360
Ram Chandra v. Balmukand	I. L. R. 29 Bom. 71	12, 64, 78, 144
Ram Charan Rai v. Kauleshar Rai	I. L. R. 27 All. 153	191
Ram Chode Das v. Rukmony Bhoy	I. L. R. 28 Mad. 487	218
Ram Dei Kunwar v. Abu Jafer	I. L. R. 27 All. 494	177
Ram Din v. Pokhar Singh	I. L. R. 27 All. 553	211
Ram Gopal Daw v. Emperor	I. L. R. 32 Calc. 793	278
Ram Jatan Rai v. Ramhit Singh	I. L. R. 27 All. 511	345
Ram Karan Thakur v. Emperor	9 C. W. N. 624	36
Ram Kumar Singh v. Watson & Co.	9 C. W. N. 334	22
Ram Lal v. Chuni Lal	I. L. R. 27 All. 372	9
Ram Mohan Pal v. Sheikh Kachu	9 C. W. N. 249	23
Ram Prasad v. Bhiman	I. L. R. 27 All. 151	95
Ram Protap Chowdry v. Lal Chand	9 C. W. N. 369	71
Ram Saran Das v. Ram Pergesh Das	I. L. R. 32 Calc. 283	271
Ram Sarup Benia v. Emperor	9 C. W. N. 1027	112
Ram Subhag v. Nar Singh	I. L. R. 27 All. 472	348
Ram Sundar Das v. Kamal Jha	I. L. R. 32 Calc. 741	302
Ramalinga Mudali v. Ayyadorai Nainar	I. L. R. 28 Mad. 125	340
Ramanuja Ayyangar v. Sadagopa Ayyangar	I. L. R. 28 Mad. 205	225
Rameswar Singh v. Jibender Singh	I. L. R. 32 Calc. 683 : 9 C. W. N. 567.	161, 256
Ranga Reddi v. Narayana Reddi	I. L. R. 28 Mad. 423	237
Rangasamy Naicken v. Thirupati Naicken	I. L. R. 28 Mad. 26	60
Ramjoy Nath Sircar v. Shambhu Nath Shaha	9 C. W. N 883	284
Rampal Singh v. Ram Prasad Singh	I. L. R. 27 All. 37: L. R. 32 I. A. 17.	45
Raneemoney Dossee v. Premmoney Dossee	9 C. W. N. 1033	181
Rani Srimati v. Khagendra Narain Singh	9 C. W. N. 74 : L. R. 31 I. A. 127 : I. L. R. 31 Calc. 871.	16, 132
Ranjit Singh v. Amulya Prosad Ghose	9 C. W. N. 923	174

Name of Case	Volume and Page	Column of Digest
Rannu Rai v. Rafi ud din	I L R 27 All 82	212
Rashmoni Das v. Surja Kanta Roy Chowdhry	I L R 32 Calc 832	171 179
Ratan Moni Dey v. Emperor	I L R 32 Calc 302 s.c. 9 C W N 547	184 277
Rashid v. Sherbanoo	I L R 29 Bom 85	109
Regulation Collector of Kalahasti v. Pamasami Chetti	I L J 28 Mad 469	249
Romanath Dass v. Mohesh Chunder Pal	9 C W N 679	48
Rose v. Soemuttv Bidiadhurry Dossee	9 C W N 167	7
Rudrappa v. Narsingrao	I L R 29 Bom 213	328
Rugad Singh v. Sat Narain Singh	I L R 27 All 178	313

S

Sabamma v. Seshayya	I L R 28 Mad 396	141
Sadananda Pal v. Emperor	I L R 32 Calc 850	86 150, 339
Sadasook Agarwallah v. Balkantha Nath Basun a	9 C W N 83	234
Safiqunnes a v. Khan Bahadur Raja Shanan Ali Khan	9 C W N 105	134 135
Sahadur v. Raj Wanta	I L R 27 All 96	175
Sahadev v. Shekh Papi Miya	I L R 29 Bom 109	2 1
Sahu Lalta Persand v. McLeod	9 C W N 841	194
Salig Ram v. Kali Shankar	I L R 27 All 465	200
Sambas va Chetti v. Veera Perumal Mudali	I L R 28 Mad. 36	53
Sandhu Taraganar v. Hussain Sahib	I L R. 28 Mad 87	60
Sankara Vadivelu Pillai v. Secretary of State for India	I L R 28 Mad 72	185, 235
Sarabji t Partap Bahadur Sahi v. Indarjit Partap Baha dur Sahi	I L R 27 All 203	160
Saramma v. Seshayya	I L R 28 Mad 396	215
Saravanai Perumal Pillai v. Poorayi	I L R 28 Mad 436	237
Sat Nara n Tewari v. Emperor	I L P 32 Calc 1033	69
Satya Charan Mukerjee v. Madhub Chunder Karmokar	9 C W N 693	65
Satyabhamabai v. Ganesh Balkr shna	I L R 29 Bom 13	73 73 337, 339
Secretary of State for India v. Kartick Chundra Ghose	9 C W N 655	86
——— v. Krishnayya	I L R 28 Mad 257	326
——— v. Narayan Balkrishna	I L R 29 Bom 102	72 93, 276
Sham Sunder v. Muhammad Iktisham Ali	I L R 27 All 581	346
Shankar Balkrishna v. Emperor	I L R. 32 Calc 73	201
Sheo Dat v. Sheo Shankar Singh	I L R 27 All 634	329
Sheo Prasad Poddar v. Corporation of Calcutta	9 C W N 18	33
Sheo Saran Singh v. Mohabir Persad Shah	I L R 32 Calc 576	201
Sheobux Ram v. Emperor	9 C W N 8 9	111
Sheoraj Roy v. Chatter Roy	I L R 32 Calc 936	3 3
Shib Chundra Roy v. Chandra Narain Mukerjee	I L R 32 Calc 719	202
Shivabasava v. Sangappa	I L R. 29 Bom 1 L. R. 31 I A 154	81, 322, 326
Shivlal Bhagvan v. Shambhu Prasad	I L R 29 Bom 4 5	147, 247, 266
Shyam Kumari v. Rameswar Singh	I L R 32 Calc 27	317
Shyamanand Das Mohapatra v. Rama Kanta Dass Mohapatra.	I L R 31 Calc 6	173
Sikandar v. Bahadur	I L R 27 All 462	304
Singarappa v. Talari Sanjivappa	I L R 28 Mad 249	238 330
Sitaram Marwari v. Thompson	I L P 32 Calc 834	49, 88

Name of Case.	Volume and Page.	Column of Digest.
Sivarama Sastrial *v.* Somasundara Mudali	I. L. R. 28 Mad. 119	59
Smidt *v.* Reddaway & Co.	I. L. R. 32 Calc. 401 : 9 C. W. N. 231.	339
Sokkanadha Vannimundar Row *v.* Sokkanadha Vannimundar.	I. L. R. 28 Mad. 344	174, 239
Somasundara Mudali *v.* Kulandivelu Pillai	I. L. R. 28 Mad. 457	52
Somu Pillai *v.* Municipal Council, Mayavaram	I. L. R. 28 Mad. 520	90, 249
Sreenivasa Chariar *v.* Ponnusawmy Nadar	I. L. R. 28 Mad. 40	141, 246
Sri Vikrama Deo Maharajulugaru, Maharaja of Jeypore *v.* Gunapuram Deenabandhu Patnaick.	I L. R. 28 Mad. 42 : 9 C. W. N. 257.	158, 311
Srikanta Nath Saha *v.* Emperor	9 C. W. N. 895	100
Srimati Moni *v.* Kalachand Gharami	9 C. W. N. 871	314
Srish Chandra Roy *v.* Mungri Bewa	9 C. W. N. 14	78, 263, 306
Subramanian Chetti *v.* Arunachellam Chetti	I. L. R. 28 Mad. 1	177
Subbaraya Mudaliar *v.* Vendanta Chariar	I. L. R. 28 Mad. 23	42, 195
Subroya Chetty *v.* Ragammal	I. L. R. 28 Mad. 161	91, 296
Sudhendu Narain Acharjya Chowdhry *v.* Gobinda Nath Sircar.	I. L. R. 32 Calc. 518 : 9 C. W. N. 504	25, 303
Sundari Letani *v.* Pitambar Letani	I. L. R. 32 Calc. 871 : 9 C. W. N. 1003.	172
Sundarji Damj *v.* Dahibai	I. L. R. 29 Bom. 319	173
Sujjad Ahmed Chowdhury *v.* Gana Charan Ghose	9 C. W. N. 460	207
Sukh Lal Sheikh *v.* Tara Chand Ta	9 C. W. N. 1048	107
Suppa Reddiar *v.* Avudai Ammal	I. L. R. 28 Mad. 50	140, 243
Surbo Lal *v.* Wilson	I. L. R. 32 Calc. 680	143
Surendra Narain Singh *v.* Gopi Sundari Dasi	I. L. R. 32 Calc. 1031 : 9 C. W. N. 834.	58
Surendra Narayan Singh *v.* Hari Mohan Misser	9 C. W. N. 87	333
Swaminatha Ayyar *v.* Vaidyanatha Sastri	I. L. R. 28 Mad. 46	56

T

Tara Chand Singh *v.* Emperor	I. L. R. 32 Calc. 1062	307
Tara Pada Biswas *v.* Nurul Huq	I. L. R. 32 Calc. 1093	104, 364
Taeliman *v.* Harihar Mahto	I. L. R. 32 Calc. 253 : 9 C. W. N. 81.	266, 347
Thakur Das Sar *v.* Adhar Chandra Misri	I. L. R. 32 Calc. 425	110, 123
Thakur Jawahir Singh *v.* Lachman Das	9 C. W. N. 745	18
Thakurain Ritraj Koer *v.* Thakurain Saifaraz Koer	9 C. W. N. 889 : L. R. 32 I. A. 165.	306
Thasi Muthu Kannu *v.* Shunmugavelu Pillai	I. L. R. 28 Mad. 413	88
Tituram Mookerjee *v.* Cohen	9 C. W. N. 1073	161
Tokhan Singh *v.* Giwar Singh	I. L. R. 32 Calc. 494	93, 139
Tufail Fatma *v.* Bitola	I. L. R. 27 All. 490	62
Turner *v.* Haji Goolam Mahomed Azam	9 C. W. N. 1 : L. R. 31 I. A. 223 : I. L. R. 28 Bom. 573.	87

U

Udit Narain Singh *v.* Murtaza Khan	I. L. R. 27 All. 464	66
Udit Upadhya *v.* Bhawani Din	I. L. R. 27 All. 84	334

Name of Case	Volume and Page.	Column of Digest.
Ujalbi Bibee v. Umakanta Karmokar	9 C. W. N. 82	23
Umatal Fatima v. Nemai Charan Banerjee	I. L. R. 33 Calc. 154	103
Umesh Chundra Das v. Shib Narain Mondul	9 C. W. N. 193	140, 344
Upendra Krishna Mandal v. Ismail Khan Mahomed	I. L. R. 32 Calc. 41 : L. R. 31 I. A. 144.	206
V		
Vaghoji Cowerji v. Camaaji Bomanji	I. L. R. 29 Bom. 249	18, 196
Vaidhinadammy Ayyar v. Somasundram Pillai	I. L. R. 28 Mad. 473	71
Vakalagadda Narasimham v. Vahizulla Sahib	I. L. R. 28 Mad. 498	71, 242
Vakulabharana v. Rangaiyan Chetty	I. L. R. 28 Mad. 357	55
Varajlal v. Shomeshwar	I. L. R. 29 Bom. 219	73, 323
Veerabadran Chetty v. Natataja Desikar	I. L. R. 28 Mad. 28	84, 220
Veerabhadra Raju Bahadur Garu v. Chiranjivi Raju Garu	I. L. R. 28 Mad. 173 : L. R. 32 I. A. 106	359
Veerchand v. Bombay, Baroda and Central India Railway	I. L. R. 29 Bom. 259	297
Venkata Row v. Venkatachella Chetty	I. L. R. 28 Mad. 452	232
Venkatachella Chetty v. Srinivasa Varada Charlar	I. L. R. 28 Mad. 555	262
Venkatagiri v. Muddukrishna	I. L. R. 28 Mad. 15	196
Venkatarama Chetti v. Emperor	I. L. R. 28 Mad. 17	250, 335
Venku v. Sitaram	I. L. R. 29 Bom. 83	34, 333
Vibudhapriya Tirthaswami v. Yusuf Sahib	I. L. R. 28 Mad. 330	65
Vijaraghava Naidu v. Sri Ivagelu Naidu	I. L. R. 28 Mad. 390	142, 215
Vijiaswami Tevar v. Sasivarma Tevar	I. L. R. 28 Mad. 560	332
Vithal Narayan v. Shivram Savant	I. L. R. 29 Bom. 391	130, 317
W		
Wahed Ali v. Emperor	I. L. R. 32 Calc. 1090	114
Wahidunnissa v. Girdhari	I. L. R. 27 All. 702	62
Walji Mathura Das v. Ebji Umersey	I. L. R. 29 Bom. 235	12, 17, 75
Woopendra Nara n Sen v. Agbore Nath Chatterjee	9 C. W. N. 493	272
Y		
Yandamuri Jagannadham v. Yandamuri Seshachelam	I. L. R. 28 Mad. 404	321
Yasin Sheikh v. Emperor	9 C. W. N. 69	277, 286, 304
Yethirajulu Naidu v. Mukunthu Naidu	I. L. R. 28 Mad. 363	179
Z		
Zaffer Nawab v. Emperor	I. L. R. 32 Calc. 930	299
Zamiran v. Fateh Ali	I. L. R. 32 Calc. 146	289
Zinat-un nissa v. Rajan	I. L. R. 27 All. 142	46

1905.

TABLE

OF

HEADINGS, SUB-HEADINGS AND CROSS REFERENCES IN THE DIGEST.

The headings and sub-headings under which the cases are arranged, are printed in this table in capitals, the headings in black type and the sub-headings in small capitals. The cross references are printed in ordinary type.

Abatement of rent.
Abatement of suit.
Abduction.
Abetment.
Absconding offender.
Abwab.
ACCOUNT.
Accretion.
Accused person.
Acknowledgment.
Acquiescence.
Acquisition of land.
Acquittal.
ACT.
ADEN COURTS ACT.
ADMINISTRATION.
ADMINISTRATOR.
ADMINISTRATOR GENERAL'S ACT.
Adoption.
ADVERSE POSSESSION.
Advocate General.
Agent.
AGRA TENANCY ACT.
Agreement.
Air.
Alienation.
Alluvial land.
Alluvion.
Amendment of plaint.
Amlahs.
Ancestral estate.
APPEAL—
1. RIGHT OF APPEAL.
2. APPEAL FROM DECREE.
APPEAL TO PRIVY COUNCIL.
Appellate Court.
ARBITRATION.
Arrears of Revenue.
Arrest.
Articles of Association.
Assets.
Attachment.
Attempt to commit offence.
Auction purchaser.
AUCTION SALE.
Award.
Babuana property.
Bail.
BANKER AND CUSTOMER.
Basta land.
BENAMI TRANSACTION.
Bengal Act.
BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887).
BENGAL DRAINAGE ACT (BENGAL ACT VI OF 1880, II OF 1902).
Bengal, North-Western Provinces and Assam Civil Courts Act.
Bengal Regulation VIII of 1819.
BENGAL REGULATION XI OF 1825.

BENGAL TENANCY ACT.
Bengal Tenancy Amendment Act (Bengal Act III of 1898)
Bequest.
Bias
BOMBAY ACTS.
BOMBAY CITY IMPROVEMENT ACT (BOMBAY ACT XIV OF 1904, IV OF 1898).
BOMBAY CITY MUNICIPAL ACT (BOMBAY ACT III OF 1888)
BOMBAY PREVENTION OF GAMBLING ACT (BOMBAY ACT IV OF 1887).
BOMBAY REGULATION II OF 1827.
BOMBAY REVENUE JURISDICTION ACT (X OF 1876, BOMBAY ACT XVI OF 1877)
BOMBAY TRAMWAYS ACT (BOMBAY ACT I OF 1874).
BOND
Breach of contract
BREACH OF THE PEACE
Bond.
BURMESE LAW.
CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899).
Calingula.
CANCELLATION.
CARRIERS.
CATTLE TRESPASS ACT (I OF 1871)
CAUSE OF ACTION.
CERTIFICATE.
Certificate of sale
Cess.
Cestui que trust
Champerty
Champerty and Maintenance
CHARGE.
Charitable trust
Charter Act
Charter party
CHAUKIDARI ACT (BENGAL ACT VI OF 1870).
CHAUKIDARI CHAKRAN LAND.
Cheating
Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879).
Chur lands.
Civil Courts.
CIVIL PROCEDURE CODE (ACT XIV OF 1882)
Civil and Revenue Courts.
Claim to attached property.
Code Napoleon.
COGNIZANCE.
Commission Agent.
COMMISSION, ISSUING OF.
Commitment.
COMPANY.
COMPENSATION.
Complaint.
Compromise
CONFESSION.
CONSEQUENTIAL RELIEF.
Contempt of Court.
CONTRACT.
CONTRACT ACT (IX OF 1872).
CONTRIBUTION.
Co-owner
COPYRIGHT ACT (XX OF 1847).
CO SHARERS.
Costs.
Court
COURT FEES.
COURT FEES ACT.
COURT SALE.
Creditors
Criminal Appeal
Criminal Breach of Contract
CRIMINAL BREACH OF TRUST.
CRIMINAL COURT.
Criminal misappropriation.
CRIMINAL PROCEDURE CODE (ACT V OF 1898).
CUSTOM.
DAMAGES.
Dayabhaga
Debutter property
Declaratory decree.
Declaratory suit
DECREE.
Dedication.
DEFAMATION.
Diluvion.
Disclaimer
Distraint.
Distress.
District Judge
District Magistrate.
Division Court.

Divorce.
Dobas.
DOCUMENT.
DOMICILE.
EASEMENT.
EASEMENTS ACT (V OF 1882).
Ejectment, suit for.
Encroachment.
ENDOWMENT.
ENHANCEMENT OF RENT.
Equity.
Equity of Redemption.
EQUITABLE ESTATES.
ESTOPPEL.
EUROPEAN BRITISH SUBJECT.
EVIDENCE.
EVIDENCE ACT.
Execution.
EXECUTION OF DECREE.
Execution sale.
Executor.
Expert opinion.
Express malice.
FACTORIES ACT (XV OF 1881).
False charge.
False information.
FATAL ACCIDENTS ACT (XIII OF 1855).
Fishery.
FIXTURE.
Ford.
Foreclosure.
FOREST ACT (VII OF 1871).
FOREST LANDS.
FORFEITURE OF PROPERTY.
Fraud.
GAMBLING.
Gaming House.
GENERAL CLAUSES ACT (X OF 1897).
GHATWALI TENURE.
GIFT.
GOVERNOR IN COUNCIL.
GRANT.
HATH CHITTA.
HIGH COURT.
HINDU LAW—
1. ADOPTION.
2. ALIENATION.
3. CUSTOM.
HINDU LAW—*continued.*
4. DEBTS.
5. ENDOWMENT.
6. GIFT.
7. GUARDIAN.
8. INHERITANCE.
9. JAINS.
10. JOINT FAMILY.
11. MAINTENANCE.
12. MARRIAGE.
13. PARTITION.
14. RESTITUTION OF CONJUGAL RIGHTS.
15. REVERSIONER.
16. STRIDHAN.
17. WIDOW.
18. WIFE.
19. WILL.
HINDU WIDOWS' REMARRIAGE ACT (XV OF 1856).
Homestead Land.
HUNDI.
Hypothecation.
IDOL.
ILLEGAL GRATIFICATION.
Immoveable property.
Impartible estate.
IMPROVEMENTS.
INAMDAR.
Incumbrances.
Indictment.
INJUNCTION.
INSOLVENCY.
INSOLVENT.
Insolvent Act (11 and 12 Vict., c. 21).
INSURANCE.
INTEREST.
Irrigation.
Jains.
A LKAR.
Joinder of charges.
Joint family.
JOINT PROPERTY.
Joint trial.
JUDICIAL PROCEEDING.
Judgment-debtor.
JURISDICTION.
Jury.
Kabuliat.
Koitima adoption.

KHOJA MAHOMEDANS
Khorposhdar
Kidnapping
KIDNAPPING FROM LAWFUL GUARDIANSHIP.
Kulachar
LACHES.
Lambardar and co-sharer
LAND ACQUISITION ACT (I OF 1894).
LANDLORD AND TENANT—
1 Crown Lands
2 Custom
3. Easement.
4 Ejectment.
5 Enhancement of Rent.
6 Fixtures.
7 Forfeiture
8 Holding over.
9 Homestead.
10 Joint Property
11. Lease.
12 Pre-emption
13. Possession
14 Rent.
15. Miscellaneous.
Landlord and Tenant Act (Bengal Act VII of 1869)
LAND REVENUE CODE (BOMBAY ACT V OF 1879).
LEASE.
LEGAL REPRESENTATIVES' SUITS ACT (MADRAS ACT XII OF 1855).
LETTERS PATENT.
LETTERS OF ADMINISTRATION.
LIBEL.
LIGHT AND AIR.
LIMITATION.
LIMITATION ACT (XV OF 1877)
LIS PENDENS.
MADRAS ABKARI ACT (MADRAS ACT I OF 1886).
Madras Act.
MADRAS COURT OF WARDS REGULATION (MADRAS ACT IV OF 1899, V OF 1905).
MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884).
MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT III OF 1889).
MADRAS HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895).
MADRAS SALT ACT (MADRAS ACT IV OF 1889).
MAGISTRATE.
MAHOMEDAN LAW—
1 Acknowledgment
2. Gift
3 Pre emption
4 Trust
5. Wakf
6 Will.
MAINTENANCE.
MALABAR LAW.
Malahs
Malice.
MALICIOUS PROSECUTION.
Manager
MANDATORY INJUNCTION
MARINE INSURANCE.
Market value
MARRIAGE.
Merchandise Marks Act (IV of 1889)
Merger
MESNE PROFITS.
Minerals.
Minor
Minority
Mirasi tenant.
Misdirection
Misjoinder
Mitakshara.
MORTGAGE—
1 Construction of Mortgage.
2. Possession under Mortgage
3 Redemption
MORTGAGE LIEN.
Mortgage suit.
Moveable property
Mulageni chit.
MULRAIYAT.
MULTIFARIOUSNESS.
Municipal Board.
Municipal Commissioner
Municipal Magistrate
Mustagir
Mutwali.
Negotiable Instruments Act (XXVI of 1881).

Occupancy right.
ONUS OF PROOF.
Order.
Ouster.
Pachis Sawal.
Paharaj.
Pakka Adat System.
Palayam, Nature of.
Panna, Maharajah of.
PARTIES.
PARTITION.
Partition suit.
Partnership.
PARTNERSHIP PROPERTY.
Patia Raj.
Patni.
PAUPER.
Pedigree.
PENAL CODE.
PENSIONS ACT (XXIII OF 1871).
Perjury.
PLAINT.
PLEADINGS.
Police.
POLICE ACT (V OF 1861).
Policy of Insurance.
POSSESSION.
Post Office Act (VI of 1898).
Posthumous son.
Pottah.
Power of Attorney.
PRACTICE.
PRE-EMPTION.
Prescription.
Presidency Magistrate.
Presidency Towns Small Cause Courts Act (XV of 1882).
Presumption.
PRINCIPAL AND AGENT.
Private International Law.
Privy Council.
Probate.
PROBATE AND ADMINISTRATION ACT (V OF 1881).
Probate duty.
Procedure.
Process.
Promissory Note.
Property.
Prosecution.
PROVIDENT FUNDS ACT (IX OF 1897 AS AMENDED BY ACT IV OF 1903).
Provincial Small Cause Courts Act, IX of 1887.
PROXY.
PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895, I OF 1897).
PUBLIC NUISANCE.
Public place.
Public policy.
PUBLIC SERVANT.
PUBLIC TRUST.
PUTNI.
Putni Sale Law Regulation (VIII of 1819).
Putni taluk.
RAILWAYS ACT (IX OF 1890).
Raiyat.
RAIYATWARI TENURE.
RATEABLE DISTRIBUTION.
RECEIVER.
RECORD OF RIGHTS.
Recovery of Rents Act (X of 1859).
Redemption.
REGISTRAR.
Registration.
REGISTRATION ACT (III OF 1877).
REGULATION XI OF 1793.
REMAND.
Remarriage.
Rent.
RES JUDICATA.
RESTRAINT OF TRADE.
Resumption.
REVENUE JURISDICTION ACT (BOMBAY ACT X OF 1876).
Revenue officer.
REVENUE SALE.
Revenue Sale Law (Act XI of 1859).
Reversioner.
REVIEW.
Revision.
Revival of suit.
RIGHT OF SUIT.
Rioting.
RIPARIAN OWNER.
Sale.
SALE FOR ARREARS OF RENT.
SALE FOR ARREARS OF REVENUE—
1. Incumbrances.

KHOJA MAHOMEDANS
Khorposhdar
Kidnapping
KIDNAPPING FROM LAWFUL GUARDIANSHIP
Kulachar
LACHES
Lambardar and co-sharer
LAND ACQUISITION ACT (I OF 1894).
LANDLORD AND TENANT—
1 Crown Lands
2 Custom
3. Easement.
4 Ejectment
5 Enhancement of Rent
6 Fixtures
7 Forfeiture
8 Holding over.
9 Homestead
10 Joint Property
11 Lease.
12 Pre emption
13. Possession
14. Rent.
15. Miscellaneous
Landlord and Tenant Act (Bengal Act VII of 1869)
LAND REVENUE CODE (BOMBAY ACT V OF 1879).
LEASE.
LEGAL REPRESENTATIVES' SUITS ACT (MADRAS ACT XII OF 1855).
LETTERS PATENT
LETTERS OF ADMINISTRATION.
LIBEL
LIGHT AND AIR.
LIMITATION.
LIMITATION ACT (XV OF 1877).
LIS PENDENS
MADRAS ABKARI ACT (MADRAS ACT I OF 1886)
Madras Act.
MADRAS COURT OF WARDS REGULATION (MADRAS ACT IV OF 1899, V OF 1905)
MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884).
MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT III OF 1889)
MADRAS HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895)
MADRAS SALT ACT (MADRAS ACT IV OF 1889).
MAGISTRATE.
MAHOMEDAN LAW—
1 Acknowledgment
2. Gift
3 Pre emption
4 Trust
5 Waqf
6 Will.
MAINTENANCE.
MALABAR LAW.
Maliahs
Malice
MALICIOUS PROSECUTION.
Manager
MANDATORY INJUNCTION.
MARINE INSURANCE.
Market value
MARRIAGE.
Merchandise Marks Act (IV of 1889)
Merger
MESNE PROFITS.
Minerals.
Minor
Minority
Miras tenant.
Misdirection
Mirjoinder
Mitakshara.
MORTGAGE—
1 Construction of Mortgage
2 Possession under Mortgage
3 Redemption
MORTGAGE LIEN.
Mortgage suit.
Moveable property
Mulagani chit.
MULBAIYAT.
MULTIFARIOUSNESS.
Municipal Board.
Municipal Commissioner
Municipal Magistrate
Mustagir
Mutwali.
Negotiable Instruments Act (XXVI of 1881)

Occupancy right.
ONUS OF PROOF.
Order.
Ouster.
Pachis Sawal.
Paharaj.
Pakka Adat System.
Palayam, Nature of.
Panna, Maharajah of.
PARTIES.
PARTITION.
Partition suit.
Partnership.
PARTNERSHIP PROPERTY.
Patia Raj.
Patni.
PAUPER.
Pedigree.
PENAL CODE.
PENSIONS ACT (XXIII OF 1871).
Perjury.
PLAINT.
PLEADINGS.
Police.
POLICE ACT (V OF 1861).
Policy of Insurance.
POSSESSION.
Post Office Act (VI of 1898).
Posthumous son.
Pottah.
Power of Attorney.
PRACTICE.
PRE-EMPTION.
Prescription.
Presidency Magistrate.
Presidency Towns Small Cause Courts Act (XV of 1882).
Presumption.
PRINCIPAL AND AGENT.
Private International Law.
Privy Council.
Probate.
PROBATE AND ADMINISTRATION ACT (V OF 1881).
Probate duty.
Procedure.
Process.
Promissory Note.
Property.
Prosecution.
PROVIDENT FUNDS ACT (IX OF 1897 AS AMENDED BY ACT IV OF 1903).
Provincial Small Cause Courts Act, IX of 1887.
PROXY.
PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895, I OF 1897).
PUBLIC NUISANCE.
Public place.
Public policy.
PUBLIC SERVANT.
PUBLIC TRUST.
PUTNI.
Putni Sale Law Regulation (VIII of 1819).
Putni taluk.
RAILWAYS ACT (IX OF 1890).
Raiyat.
RAIYATWARI TENURE.
RATEABLE DISTRIBUTION.
RECEIVER.
RECORD OF RIGHTS.
Recovery of Rents Act (X of 1859).
Redemption.
REGISTRAR.
Registration.
REGISTRATION ACT (III OF 1877).
REGULATION XI OF 1793.
REMAND.
Remarriage.
Rent.
RES JUDICATA.
RESTRAINT OF TRADE.
Resumption.
REVENUE JURISDICTION ACT (BOMBAY ACT X OF 1876).
Revenue officer.
REVENUE SALE.
Revenue Sale Law (Act XI of 1859).
Reversioner.
REVIEW.
Revision.
Revival of suit.
RIGHT OF SUIT.
Rioting.
RIPARIAN OWNER.
Sale.
SALE FOR ARREARS OF RENT.
SALE FOR ARREARS OF REVENUE—
1. INCUMBRANCES.

SALE FOR ARREARS OF REVENUE—*continued*
2. FRAUDULENT SALE
3. SALE
4. SEPARATE SHARES.
Sanad.
Sanction
Sanction to prosecute.
Scheduled Districts Act (XIV of 1874)
Sebait.
SECOND APPEAL.
Security for costs
Security for good behaviour
SECURITY FOR KEEPING THE PEACE.
Service tenure.
Sessions Court.
Sessions Judge power of
Set off
Settlement Officer jurisdiction of
Shebait
Sheri lands.
Shiah Vendor
SLANDER.
SMALL CAUSE COURTS, MOFUSSIL TOWNS.
SMALL CAUSE COURTS, PRESIDENCY TOWNS
SOUTH CANARA.
SPECIAL OR SECOND APPEAL.
SPECIFIC PERFORMANCE.
SPECIFIC RELIEF ACT (I OF 1877).
STAMP ACT (II OF 1899).
STARE DECISIS.
STATUTES.
STREET
Stridhan.
Success on.
Succession Act (X of 1865)
SUCCESSION CERTIFICATE ACT (VII OF 1889).
SUIT
Suits Valuation Act (VII of 1887)
Sunni Law
SURETY
Talab-i lahtash had.
Talukdari tenure
Tenant.
TENANTS IN COMMON.
THAK MAP
Theft.
THUMB MARK.
Title.
TORT
TRADE MARK.
Trade name
Transfer
TRANSFER OF IMMOVEABLE PROPERTY
Transfer of Property Act (IV of 1882)
Trespass
TRUST
TRUSTEE
TRUSTEES ACT (XXVII OF 1866).
Trustees and Mortgagees Act (XXVIII of 1866)
TRUSTS ACT (II of 1882).
ULTRA VIRES.
Unchastity
UNITED PROVINCES LAND REVENUE ACT (III OF 1901).
Usage of Trade
Usufruct
Usufructuary Mortgage.
VAKIL.
VALUATION OF LAND
Valuation of suit.
VENDOR AND PURCHASER.
Wagering
WAGERING CONTRACT.
Waiver
Wajib ul arz.
Wakf
Wakf property
Warg Land
Water rights.
WIDOW
WILL.—
1 CONSTRUCTION OF WILL.
2. EXECUTION OF WILL.
3 PRACTICE.
4. PROBATE
WITNESSES.

ANNUAL DIGEST

OF

THE HIGH COURT REPORTS

AND OF

THE PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA,

1905.

A

ABATEMENT OF RENT.

See BENGAL TENANCY ACT.

ABATEMENT OF SUIT.

See CIVIL PROCEDURE CODE, ss. 368, 371.

ABDUCTION.

See KIDNAPPING.

ABETMENT.

See PENAL CODE.
9 C. W. N. 69

ABSCONDING OFFENDER.

See CRIMINAL PROCEDURE CODE.

ABWAB.

See CIVIL PROCEDURE CODE, s. 13.
9 C. W. N. 469

ACCOUNT.

See EVIDENCE ACT, s. 34.
9 C. W. N. 421

See LIMITATION ACT, SCH. II, ART. 106, s. 7 . . . 9 C. W. N. 537

See MAHOMEDAN LAW.
I. L. R. 29 Bom. 267

See PRACTICE . I. L. R. 29 Bom. 107

See PROVINCIAL SMALL CAUSE COURTS ACT . . I. L. R. 28 Mad. 394

See SALE FOR ARREARS OF REVENUE.
I. L. R. 32 Calc. 27

——— *Agreement—Restraint of trade—Contract Act (IX of 1872), ss. 23, 27—Continuous cause of action—Damages—Transfer of business to a limited Company—Effect.—Held,* that an order directing a Company to furnish an account will not extend beyond, or include contributions, which accrued later than the date when the business of such Company was transferred to a limited Company. FRASER AND COMPANY *v.* THE BOMBAY ICE MANUFACTURING COMPANY (1905).
I. L. R. 29 Bom. 107

ACCRETION.

See BENGAL REGULATION XI OF 1825.

ACCUSED PERSON.

See CONFESSION. I. L. R. 32 Calc. 550

See CRIMINAL PROCEDURE CODE, ss. 133, 183, 342 . . 9 C. W. N. 983

See DISTRICT MAGISTRATE XI OF 1825.
I. L. R. 32 Calc. 1090

ACKNOWLEDGMENT.

See BENGAL TENANCY ACT, SCH. III, ART. 6 . . 9 C. W. N. 1025

See LIMITATION ACT, ss. 19, 20, 21.
9 C. W. N. 868

See STAMP ACT, SCH. I, ART. 1.
I. L. R. 27 All. 84

ACQUIESCENCE.

See HINDU LAW. I. L. R. 29 Bom. 400

See LANDLORD AND TENANT.
I. L. R. 27 All. 338

ACQUISITION OF LAND.

See LAND ACQUISITION ACT.

ACQUITTAL.

See CRIMINAL PROCEDURE CODE, s. 439.
I. L. R. 27 All. 359

ACT

——— 1839—XXIV.

See Governor in Council.

——— 1847—XX.

See Copyright Act

——— 1850—XXI.

See Hindu Law, Marriage

——— 1855—XII.

See Legal Representatives Suits Act

——— 1855—XIII

See Fatal Accidents Act

——— 1856—XV

See Hindu Widows Remarriage Act

——— 1859—XI.

See Sale for Arrears of Revenue

——— 1859—XIII.

See Contract

——— 1859—XIV.

See Limitation

——— 1860—XXXVI.

See Stamp Act

——— 1860—XLV

See Penal Code

——— 1864—II.

See Aden Courts Act

——— 1865—X.

See Succession Act

——— 1866—XXVII.

See Trustees Act

——— 1867—III.

See Gambling Act

——— 1867—XXV

See Press and Registration of Books Act

——— 1867—XXVIII.

See Trustees and Mortgagees Act

——— 1869—I.

See Oudh Estates Act

——— 1870—VII.

See Court Fees Act

——— 1871—I.

See Cattle Trespass Act

ACT—*continued.*

——— 1871—VII.

See Forest Act

——— 1871—XXIII.

See Pensions Act

——— 1872—I.

See Evidence Act

——— 1872—IX.

See Contract Act

——— 1874—XIV.

See Scheduled Districts Act

——— 1876—X.

See Bombay Revenue Jurisdiction Act.

——— 1876—XVII

See Oudh Land Revenue Act

——— 1876—XVIII.

See Oudh Laws Act

——— 1877—III.

See Registration Act

——— 1877—XV.

See Limitation Act

——— 1881—V.

See Probate and Administration Act

——— 1881—XV

See Factories Act

——— 1881—XXVI

See Negotiable Instruments Act

——— 1882—II.

See Trusts Act

——— 1882—IV.

See Transfer of Property Act

——— 1882—V

See Easements Act

——— 1882—VI.

See Companies Act

——— 1882—X.

See Criminal Procedure Code.

——— 1882—XIV.

See Civil Procedure Code

ACT—*continued.*

——— 1882—XV.

See SMALL CAUSE COURTS, PRESIDENCY TOWNS.

——— 1885—VIII.

See BENGAL TENANCY ACT.

——— 1887—VII.

See SUITS VALUATION ACT.

——— 1887—IX.

See PROVINCIAL SMALL CAUSE COURTS ACT.

——— 1887—XII.

See BENGAL, AGRA AND ASSAM CIVIL COURTS ACT.

——— 1889—IV.

See MERCHANDISE MARKS ACT.

——— 1889—VII.

See SUCCESSION CERTIFICATE ACT.

——— 1890—IX.

See RAILWAYS ACT.

——— 1894—I.

See LAND ACQUISITION ACT.

——— 1895—I.

See SMALL CAUSE COURTS, PRESIDENCY TOWNS.

——— 1895—XV.

See CROWN GRANTS ACT.

——— 1897—IX.

See PROVIDENT FUNDS ACT.

——— 1897—X.

See GENERAL CLAUSES ACT.

——— 1898—I.

See OPIUM ACT.

——— 1898—III.

See BENGAL TENANCY AMENDMENT ACT.

——— 1898—V.

See CRIMINAL PROCEDURE CODE.

——— 1898—VI.

See POST OFFICE ACT.

——— 1899—II.

See STAMP ACT.

——— 1899—XI.

See COURT FEES ACT.

ACT—*concluded.*

——— 1902—V.

See ADMINISTRATOR GENERAL'S ACT.

——— 1903—IV.

See PROVIDENT FUNDS ACT.

ADEN COURTS ACT (II OF 1864).

——— ss. 17, 20, 22, 23—*Criminal Procedure Code (Act V of 1898), ss. 447, 449—Resident's Court at Aden—Sessions Court—Transfer of case to the High Court—Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden—Letters Patent, cl. 29.*—It is not competent to the Resident at Aden, to whose Court as a Court of Session a case is committed under s. 447 of the Criminal Procedure Code, 1898, to transfer the case to the High Court, under the provisions of s. 449 of the Code, on the ground that the offence cannot be adequately punished by him. The powers of the Court of Session conferred upon the Resident at Aden by the Aden Courts Act (II of 1864) are not merely such as are defined in the Criminal Procedure Code, 1898, but such as are provided expressly in the Act itself. And s. 449 of the Code of Criminal Procedure, 1898, cannot affect those provisions. The High Court of Bombay can, under cl. 29 of the amended Letters Patent, transfer to itself a case pending in the Court of Session at Aden. EMPEROR *v.* ROBERT COMLEY (1905).

I. L. R. 29 Bom. 575

ADMINISTRATION.

See EVIDENCE . I. L. R. 32 Calc. 710

See HINDU LAW . 9 C. W. N. 923

See LIMITATION ACT, s. 7.
9 C. W. N. 537

——— *Decree—Administration suit—Civil Procedure Code (Act XIV of 1882), Sch. IV, Form 130.*—After the preliminary decree in an administration suit declaring the right of a defendant to a certain share in the estate, the Court ought not to sanction a compromise between the plaintiffs and the executors to the effect that the entire estate should be made over to the plaintiffs and the executors released from further accounting, entirely ignoring the rights of the other defendants. In decrees in suits for administration the Subordinate Courts ought to follow the form prescribed in Form 130, Sch. IV of the Civil Procedure Code. AJOY KUMARI DEBI *v.* MANINDRA NATH CHATTERJEE (1905).

I. L. R. 32 Calc. 561

——— *Administration of estate by Court—Position of creditors—Default on creditor's part—Creditor admitted so as not to disturb past dividends, position of—Equity.*—The general principle governing the position of creditors of an estate under administration by the Court is that they will on due cause shown be let in at any time, while the fund is in Court, even where the money has been apportioned amongst the creditors and transferred to the Accountant-General for payment to them. *Lashley*

ADMINISTRATION—*concluded.*

v *Hogg, 11 Ves 603; Angell* v *Hardon, 1 Mad 529; David* v *Frowd, Mylne & Keen* 200, referred to. Where, however, a creditor has been guilty of remissness in the assertion of his claim, his default shall not be allowed to operate so as to prejudice or inconvenience others more diligent than himself *Cattell* v *Simons, 5 Beav 243*, referred to. The legal position of a creditor, who for some reason or other has been excluded from a first dividend and subsequently gets his claim admitted to the schedule *so as not to disturb past dividends*, is that, if further assets come in, he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid. *Knee* v *Prescot, 1 Atkyns 243*, referred to Tosh v Sree mutty Biddabhurny Dassee (1903) 9 C. W. N. 167

——— *Administration of trust by Court—Appointment of new trustee, if sanction of Court necessary—Concurrent sanction of Court.*—Where a suit has been instituted for the administration of a trust and a decree has been made that attracts the jurisdiction of the Court and the trustee cannot afterwards exercise the power given to him by the settlor to appoint new trustees without the concurrent sanction of the Court His power in such a case is merely one of nomination to be confirmed by the Court on consideration of the fitness of the nominee to be a trustee *In re Hall, 54 L J N S Ch 627*: s.c *51 L T N S 901*, distinguished Amrita Bibee v Kanhai Lal Agarwalla (1905) 9 C. W. N 239 s.c. I. L. R. 32 Calc. 448

ADMINISTRATOR.

———*Civil Procedure Code (Act XIV of 1882), ss 13, 244—Succession Act (X of 1865), s 282—Execution sale—Suit by subsequent administratrix to set aside decree and sale—Fraud or collusion—Rateable distribution—Res judicata—Procedure in creditor's suit against estate of deceased.*—A decree on an award having been passed against an administrator at the instance of a creditor of the estate represented by the administrator, certain property referred to in the award was purchased by the decree-holder in execution proceedings with the sanction of the Court. Afterwards an administratrix appointed in the place of the administrator, having brought a suit to set aside the decree and the subsequent sale in execution on the ground that under s 282 of the Succession Act (X of 1565) the decree holder was entitled only to a rateable distribution among the creditors of the estate *Held*, that in the absence of fraud or collusion the decree and the subsequent sale in execution could not be set aside *Held further*, that according to ss 13 and 244 of the Civil Procedure Code (Act XIV of 1882) the decree having been executed, the execution bound the parties and all persons claiming through them, and that the question was, therefore, *res judicata*. *Per* Chandavarkar, J.—"The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative, in whom all the property of the deceased rests as

ADMINISTRATOR—*concluded.*

such by virtue of s 179 of the Succession Act, may be said to be similar to that of the *cestui que trust* of an idol." *Prosunno* v *Golab, L. R 2 I A 145*, referred to and applied. A creditor's action against the estate of a deceased person should be treated as an administration suit. Bai Meherbai v. Magan-chand (1905) . . . I. L. R. 29 Bom. 96

ADMINISTRATOR GENERAL'S ACT (V OF 1902)

——— s. 4, cl. 2—*Trusts Act (II of 1882), s 72—Discharge by Court of an executor—Vesting of property in the continuing executor.*—The Court has power to discharge an executor on his own application, if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone, while an executor—it only relieves him from the duties of his office from the date of discharge *Re goods* Amerchand Madhowji (1905) . . I. L. R. 29 Bom. 168

ADOPTION.

See Burmese Law I. L. R. 32 Calc. 219

See Hindu Law I. L. R. 32 Calc. 891
I. L. R. 27 All. 271, 417
I. L. R. 29 Bom. 51, 346, 400, 410

See Limitation . I. L. R 32 Calc. 165

ADVERSE POSSESSION.

See Co sharer, possession by 9 C. W. N. 32

See Decree . 9 C. W. N. 296

See Forfeiture . 9 C W. N 553

See Limitation I. L. R. 27 All. 348

See Limitation Act, s. 7 9 C. W. N. 795

See Limitation Act, Sch. II, Art 144 I. L. R. 27 All. 395

See Mahomedan Law 9 C. W. N 625

See Mortgage . 9 C. W. N. 201

See Prescription . 9 C. W. N. 292

——— *Tenants-in common—Exclusive receipt of profits by one tenant continuously for long time—Presumption as to actual ouster of other tenants in common.*—To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. Gangadhar v Parashram (1905) . . . . I. L. R 29 Bom. 300

——— *Suit by co-sharer against lambardars for profits of his share—Limitation—Nature of possession of lambardar—Held*, that the fact that a co sharer plaintiff in a suit against the lambardar for

ADVERSE POSSESSION—*concluded.*

his share of profits for three years antecedent to the suit have received no profits for twelve years previous to suit is not by itself sufficient to bar the suit in the absence of evidence that the defendant lambardar was during those twelve years holding adversely to the plaintiff. *Raj Bahadur* v. *Bharat Singh, I. L. R. 27 All. 348,* followed. *Muhammad Husain* v. *Badri Prasad, Weekly Notes, p. 88,* distinguished. *Mahadeo Prasad* v. *Raja Sawal Singh, L. P. A., No. 8 of 1902,* decided on the 13th of June 1902, discussed. MIHIN LAL *v.* BADRI PRASAD (1905) . . I. L. R. 27 All. 436

ADVOCATE-GENERAL.

———— Sanction of, when necessary to bring suit.

See CIVIL PROCEDURE CODE, s. 539.
9 C. W. N. 151

See PRACTICE. I. L. R. 29 Bom. 19, 133

AGENT.

See PRINCIPAL AND AGENT.

AGRA TENANCY ACT (II OF 1901).

———— ss. 79 and 81—*Civil and Revenue Courts—Jurisdiction—Suit by ejected tenant for restoration to possession—Limitation.*—An occupancy tenant died leaving two daughters, who had their names recorded as occupancy tenants of their deceased father's holding, but never obtained actual possession thereof. On the contrary, the zamindar put in his own tenant. One of the daughters of the late occupancy tenant, however, gave a lease of half the holding, and the lessees ultimately sued the zamindar's tenant in a Civil Court to recover possession. *Held,* that the plaintiff's proper remedy was by suit under s. 79 of Act II of 1901, and as he had been out of possession for something like three years, his suit was barred by limitation. *Dalip Rai* v. *Deoki Rai, I. L. R. 21 All. 204,* referred to. RAM LAL *v.* CHUNI LAL (1905).
I. L. R. 27 All. 372

———— s. 134.

See PENAL CODE.

———— ss. 175, 180 and 193—*Civil Procedure Code, s. 2—"Decree"—"Order"—Appeal.*—*Held,* that no appeal will lie from an appellate order of a Collector, as distinguished from an appellate decree, in proceedings under the Agra Tenancy Act, 1901. In order to decide what are "orders" and what "decrees" under the Tenancy Act, 1901, the definitions contained in the Civil Procedure Code, s. 2, must be applied. DHANI RAM *v.* BHOLA SINGH (1905) . . . . I. L. R. 27 All. 21

———— ss. 176, 177 and 193—*Civil Procedure Code, ss. 2 and 244—"Orders"—"Decree"—Appeal.*—*Held,* that an appeal will lie to the District Judge from an order of an Assistant Collector of the first class, if such order, by the force of s. 2 of the Code of Civil Procedure, amounts to a decree. KHARAG SINGH *v.* POLA RAM (1905).
I. L. R. 27 All. 31

AGRA TENANCY ACT (II OF 1901)—*concluded.*

———— s. 201.

See NORTH-WEST PROVINCES RENT ACT, s. 93.

———— s. 202—*Question of tenant right in Civil Court—Question decided by Civil Court—Appeal—Procedure.*—Where in contravention of the provisions of s. 202 of the Agra Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant right was raised, and on appeal the lower Appellate Court remanded the suit under s. 562 of the Code of Civil Procedure, it was held that the lower Appellate Court ought not to have remanded the case, but should itself have passed the order required by s. 202 of the Tenancy Act, and the High Court made such an order. JAGAN NATH *v.* BHAWANI (1905) . . I. L. R. 27 All. 167

AGREEMENT.

See ACCOUNT.

See CONTRACT ACT.

AIR.

See EASEMENT.

ALIENATION.

See HINDU LAW, ALIENATION.

ALLUVIAL LAND.

See ACCRETION.

ALLUVION.

See REGULATION XI OF 1825.

AMENDMENT OF PLAINT.

See PLAINT.

AMLAHS.

See EVIDENCE ACT.

ANCESTRAL ESTATE.

See HINDU LAW.

APPEAL. Col.

1. RIGHT OF APPEAL 11
2. APPEAL FROM DECREE . . . 14

See AGRA TENANCY ACT.

See BENGAL TENANT ACT.
9 C. W. N. 122, 721

APPEAL—*continued.*

See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT.

See COMPANIES ACT, ss 59, 147 AND 169 I. L. R. 27 All. 509

See COURT FEES ACT, s 7, SCH I I. L. R. 7 All. 395

See COURT FEES ACT, s. 11, SCH II, ART 17 (vi) I. L. R. 27 All. 559

See CRIMINAL PROCEDURE CODE 9 C. W. N. 331, 833, 860

See DECREE . I. L. R. 32 Calc. 908

See LETTERS PATENT . 9 C. W. N. 502

See LIMITATION I. L. R. 32 Calc. 175. 9 C. W. N. 495, 605, 644, 673, 835, 956, 1031 A. I. 1, 200, 263, 330 631, 695

See PRIVY COUNCIL . 9 C. W. N 370

See REMAND . I. L. R. 32 Calc 1039

See SALE FOR ARREARS OF REVENUE I. L. R. 33 Calc 111

See SANCTION FOR PROSECUTION I. L. R. 32 Calc 379

See SECURITY TO KEEP THE PEACE I. L. R. 33 Calc 949

1 RIGHT OF APPEAL

——— *Appeal, right of—Appeal by defendant against whom suit dismissed—Party whether aggrieved by decree, a question of fact—Civil Procedure Code (Act XIV of 1882), ss 108, 591—Orders setting aside ex parte decree, whether one affecting decision of the case—Held,* on a review of authorities, that a defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree. *Mussamut Ooguee Chowdhrain v Shaikh Keramutoollah* 17 W R 219, distinguished. The question whether a party is aggrieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances KRISHNA CHANDRA GOLDAR v MAHESH CHANDRA SAHA (1905) 9 C. W N 584

———*Bengal Tenancy Act (VIII of 1885), s 153—Order setting aside sale—High Court—Revision, power of—Civil Procedure Code (Act XIV of 1882), s 622.*—An order setting aside a sale in execution of a decree decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto, and is therefore appealable under s. 153 of the Bengal Tenancy Act (VIII of 1885), although it was made by an officer specially authorized under the section in a suit for rent valued at less than fifty rupees. In deciding whether an order is appealable under that section the point for consideration is not what that decree in the suit decided, but what the order decided *Monmohini Dasi v Lakhan Chandra, I. L. R 28 Calc 116*, distinguished. Where a Court rejects an application under ss 244 and 311 of the Civil Procedure Code on the ground that the applicant had no *locus standi*, the case would not fall within s 622 of the Code. GANGA CHARAN BHATTACHARJEE v BHOSHI BHUSAN ROY (1905) . . . . I. L. R. 32 Calc. 572

APPEAL—*continued*

1 RIGHT OF APPEAL—*continued.*

——— *City of Bombay Improvement Act (Bombay Act IV of 1898), s 43 (11)—Award by Tribunal of Appeal—Cross objections—Civil Procedure Code (Act XIV of 1882), s 561.*—S 43 (11) of the City of Bombay Improvement Act (Bombay Act IV of 1898) does not provide for leave to appeal being granted to any individual, but for a certificate that the case is a fit one for appeal, that is, the whole case and not any particular part of it. The consequence of the grant of the certificate is that there shall be an appeal to the High Court from the award, or any part of the award, and this must mean that there shall be a right to appeal or, to use the language of the Civil Procedure Code (Act XIV of 1882), that an appeal will lie to the High Court and the respondents will be entitled to object in the manner provided by s 561 of the Code RAGHUNATHDAS v SECRETARY OF STATE (1905). I. L. R 29 Bom. 514

——— *Civil Procedure Code (Act XIV of 1882), ss 521, 522—Award—Alleged misconduct of arbitrator's misconduct—Decree following award—Held,* unless it is shown that the award is illegal *ab initio*, or in other words where there is no award in law, no appeal lies from a decree following a judgment given according to an award. *Dendraw Dajiram v Nemchand Jadaechand, I L R 17 Bom. 375*, approved; *Kali Prosunno Ghose v. Rajani Kant Chatterjee, I L R 25 Calc 341*, referred to. WALJI MATHURA DAS v FAZI UMEDJI (1905) . . I. L. R. 29 Bom. 285

——— *Court Fees Act (VII of 1870), s 7—A preliminary objection was taken that no appeal lay to the High Court on the ground that the suit had been valued at Rs10 and was one for a declaration, the prayer for possession being merely consequential. Held,* overruling the objection, that the suit fell within the scope of s 7, cl. v, of the Court Fees Act (VII of 1870), and that the real value of the property being more than Rs,000, an appeal lay to the High Court RAI MEHERBAI v MAGANCHAND (1905) . I. L. R. 29 Bom. 96

——— *Execution of decree—Order refusing stay—Appeal—Deliberate exercise of discretion by lower Court—Civil Procedure Code (Act XIV of 1882), ss 244, 545.—An order* refusing to stay execution of a decree under s 545 of the Civil Procedure Code (Act XIV of 1882) is not appealable. *Musaji Abdulla v Damodardas, I L R 12 Bom 279*, doubted. PANCHANDRA v BALMUKUND (1905) . I. L. R. 29 Bom 71

——— *Letters Patent, Art 12—Suit for land—Jurisdiction—Leave of Court—Cause of action—Title—Appeal from order discharging summons—Held,* that an appeal lies from an order dismissing a Judge's summons to show cause why leave granted

APPEAL—*continued.*

1. RIGHT OF APPEAL—*continued.*

under cl. 12 of the Letters Patent should not be rescinded and the plaint taken off the file. VAGHOJI KUVERJI v. CAMAJI BOMANJI (1905).

I. L. R. 29 Bom. 249

———— *Partition suit—Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit—Decree dismissing appeal—Civil Procedure Code (Act XIV of 1882), ss. 373 and 582.*—A question having arisen as to whether or not the decree of the lower Appellate Court was appealable under ss. 373 and 582 of the Civil Procedure Code (Act XIV of 1882): *Held*, that ss. 373 and 582 of the Civil Procedure Code do not support the conclusion that rights actually vested by the decree of the first Court can afterwards be annulled by the plaintiff withdrawing of his own free will and without permission of the Court. The result of the adjudication was that there was a formal expression of an adjudication by the lower Appellate Court upon a right claimed by the defendants (appellants in second appeal) and thus there was a decree within the meaning of the Civil Procedure Code from which an appeal would lie. SATYABHAMABAI v. GANESH BALKRISHNA (1905) . . I. L. R. 29 Bom. 13

———— *Appeal from order—Appeal presented after final disposal of suit—Civil Procedure Code (Act XIV of 1882), s. 588—Landlord and tenant—Transfer by tenant—Yearly tenancy—Transfer of tenancy.*—The right of appeal from interlocutory orders ceases with the disposal of the suit. Where on the plaintiff's appeal a suit was remanded under s. 562 of the Civil Procedure Code and on remand the Court of first instance decided the case in the plaintiff's favour and there was no appeal from that decision, but the defendant afterwards appealed to the High Court against the order of remand. *Held*, that the appeal was not maintainable. *Jalinga Valley Tea Company, Limited* v. *Chera Tea Company, Limited, I. L. R. 12 Calc. 45*, distinguished. The incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary. *Hari Nath Karmakar* v. *Raj Chandra Karmakar, 2 C. W. N. 122*, followed. *Banee Madhab Bonerjee* v. *Joy Kishen Mookerjee, 12 W. R. 495: 7 B. L. R. 152*, distinguished. MADHU SUDAN SEN v. KAMINI KANTA SEN (1905) . I. L. R. 32 Calc. 1023

———— *Order—Order directing refund of compensation money paid—Land Acquisition Act (I of 1894), ss. 32, 53, 54—Civil Procedure Code (Act XIV of 1882), ss. 254, 588, 649—Execution, mode of—Order directing payment of money.*—An order made by a Court in a proceeding under the Land Acquisition Act, directing a party, to whom a sum of money awarded as compensation under the Act had been paid under a previous order, to refund the money, is not an award or a portion of an award within the meaning of s. 54 of the Act, nor does it come under any of the orders mentioned in s. 588 of the Civil Procedure Code. No appeal therefore lies from such an order. *Sheo Ratlan Roy* v. *Mohri, I. L. R. 21 All. 354; Mahammad Ali Raja Avergal* v. *Mahammed Ali Raja Avergal, I. L. R. 26 Mad. 287*, distinguished. The order directing a refund may be enforced by the imprisonment of the party against whom it is made or by the attachment and sale of his property under ss. 254 and 649 of the Civil Procedure Code. NOBIN KALI DEBI v. BANALATA DEBI (1905) I. L. R. 32 Calc. 92

APPEAL—*continued.*

1. RIGHT OF APPEAL—*concluded.*

———— *Bengal Tenancy Act (VIII of 1885), s. 153—Appeal from order.*—*Held* by the Full Bench, RAMPINI, J., dissenting:—An order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls within the proviso to s. 153 of the Bengal Tenancy Act and is appealable, although there could be no appeal from the decree in the suit on account of the prohibition contained in that section. KALI MANDAL v. RAMSARDASWA CHAKRAVARTI (1905)

I. L. R. 32 Calc. 957
9 C. W. N. 721

2. APPEAL FROM DECREE.

———— *Appeal—Summary dismissal—Reasons if to be recorded.*—It is not necessary, where an appeal is summarily dismissed under s. 421 of the Code of Criminal Procedure, for the Magistrate to give any reasons for his decision. It must be taken, if he does dismiss an appeal summarily, that he considered there were no sufficient grounds for interfering. *Rash Behari Das* v. *Bal Gopal Singh, I. L. R. 21 Calc. 92*, followed. NITYA LAL v. BENI MADHAB GHOSE (1905) . . . . . 9 C. W. N. 623

———— *Appeal by one of several defendants—Ground common to all.*—Plaintiffs sued on a mortgage bond. The defence, which was common to all the defendants, was that the mortgage was a sham. The Subordinate Judge upheld the mortgage bond and decreed in plaintiffs' favour. The fifth defendant, a subsequent mortgagee, alone appealed to the District Judge, who reversed the decree and dismissed the suit. Plaintiffs appealed to the High Court:—*Held*, that the decree of the Subordinate Judge proceeded on a ground common to all the defendants and that the decree of the Lower Appellate Court enured for the benefit of the defendants, who did not appeal. ANNAMALAY CHETTIAR v. PITCHU AYYAR (1905) . I. L. R. 28 Mad. 122

———— *Suit of the nature cognisable by a Court of Small Causes—Appeal.*—The plaintiff sued as widow of a deceased Brahman priest to recover from the defendant certain books containing lists of the clients of her late husband and also a sum of R60, on the allegation that the defendant had been entrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband, and contrary to the terms of the agency, had not handed over the money, which he had obtained from the clients to her. *Held*, that this was a suit of the nature cognizable by a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. HANS RAJ v. RATNI (1905) . I. L. R. 27 All. 200

APPEAL—*concluded*

2 APPEAL FROM DECREE—concluded.

——— *Order refusing application for appointment of commissioner to effect division of property by metes and bounds in partition suit—Limitation Act (XV of 1877), Sch II, Art 178*—The parties to a suit for partition entered into a compromise, which was recorded by the Court and by which their respective shares in the family property were agreed upon. An application was subsequently made for the appointment of a commissioner to effect an actual division of the property, but the Subordinate Judge dismissed it on the ground that the right to claim further relief in the matter had become barred by limitation. This order was reversed on appeal and the case was remanded by the District Judge for disposal according to law. An appeal was then preferred to the High Court against the order of remand, when it was contended that no appeal lay to the District Judge against the order of the Subordinate Judge:—*Held*, that an appeal lay. The order of the Subordinate Judge on the face of it purported to decide a question to be dealt with under s 244 of the Code of Civil Procedure and was therefore a decree within the meaning of that term in the Code, and that the party against whom it was passed, was entitled to appeal therefrom. Even if there was no decree to be executed, and the Subordinate Judge erroneously supposed the matter to be one in execution, and held the application to be barred, such usurpation of jurisdiction could not make the order passed in consequence thereof less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed. *Harnath Chunder Chowdry* v. *Kali Sundari Debia*, *L R 10 I A 4*, and *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*, *I L R 23 Mad 517*, followed. Such an application is not an application of the description contemplated by Article 178. LATCHMANAN CHETTY v. RAMANATHAN CHETTY (1905) . I. L. R. 28 Mad. 127

APPEAL TO PRIVY COUNCIL.

——— *Panna, Maharajah of—Order of Viceroy and Governor General of India deposing Ruler of Native State—Report of Commissioners appointed to inquire into imputation against Native Ruler—"Court"*—No appeal lies to His Majesty the King in Council from an order of the Viceroy and Governor General of India in Council deposing the Maharajah of the Native State of Panna, such order being an act of State. An order was made on the report of the Commissioners appointed by the Viceroy and Governor General of India in Council, "for the purpose of inquiring into the truth of an imputation against the Maharajah that he had instigated the death of his uncle, and of reporting to the Viceroy and Governor General in Council how far the same is true to the best of their judgment and belief." *Held*, that such a tribunal was not a "Court" from which an appeal lay to His Majesty in Council. MADHAVA SINGH, IN RE (1905) . I. L. R. 32 Calc. 1
s.c. L. R. 31 I. A. 239

——— *Letters Patent, cl 39—Division Court—Civil Procedure Code (Act XIV of 1882), ss 595 and 596*—Where on an appeal to His Majesty in Council the case was sent back to the High Court with a direction that certain accounts might be taken on a certain footing and a Division Bench of the High Court took those accounts and made a final decree: *Held*, that an appeal would lie to His Majesty in Council from such decree under cl. 39 of the Letters Patent, the amount in dispute being over Rl0,000. The expression "Division Court" in that section is not restricted to a Division Court sitting on the Original Side. Ss 595 and 596 of the Civil Procedure Code do not apparently apply to such a case. GOBIND PROSUNNO LAHIRI v. JOGINDRA MOHUN LAHIRI (1905)
I. L. R. 32 Calc. 663

——— *Appeal—Privy Council—Appeal—Practice—Concurrent findings of fact—Miscarriage of justice or violation of law, not proved—Evidence—Admissibility of documents—Res inter alios acta*—Where the appellants before the Judicial Committee failed to show any miscarriage of justice or the violation of any principle of law or procedure, their Lordships refused to interfere with the concurrent findings of two Courts on pure questions of fact, although they thought the case to be one of great difficulty. RANI SRIMATI v. KHAJENDRA NARAIN SINGH (1905) . . 9 C. W. N. 74
s.c. L. R. 31 I. A. 127

——— *Review of judgment—Appeal from order granting review—Grounds of appeal*—When an application for review of judgment has been granted for "any other sufficient reason," the sufficiency or otherwise of the reason for granting it is not a ground of appeal within the meaning of s 629 of the Code of Civil Procedure. *Per* RICHARD, J.—But the fact that the Court-fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment. ALI AKBAR v. KHURSHED ALI (1905)
I. L. R. 27 All. 695

APPELLATE COURT.

See APPEAL.

ARBITRATION.

See CIVIL PROCEDURE CODE.
9 C. W. N. 873
I. L. R. 27 Bom. 921

——— *Arbitration—Award—Validity of award made, but not reaching the Court within the time limited*—In the case of an arbitration made under the order of a Court it is sufficient, if the award be made, that it is completed and signed by the arbitrators, within the period limited under s. 508 of the Code of Civil Procedure; it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period. *Arumugam Chetti* v. *Arunachalam Chetti*, *I. L. R. 22 Mad. 22*, and *Umersey Premji* v. *Shamji Kanji*, *I L R 13 Bom 119*, followed. *Raja Har Narain Singh* v. *Chandrakala Bhagwant Kuar*, *I L R 13 All. 300*, referred to. *Behari Das* v. *Kalian Das*, *I L*

ARBITRATION—*concluded.*

R. 8 All. 543, dissented from. ASAD-UL-LAH v. MUHAMMAD NUR (1905) . I. L. R. 27 All. 459

——— *Civil Procedure Code (Act XIV of 1882), ss. 521, 522—Allegations of arbitrator's misconduct—Decree following award—Appeal from the decree.*—The plaintiff filed a suit for the dissolution and winding up of a partnership. The matters in dispute were referred to arbitration by an order of the Court; an award was made; an application was made by the appellant to set aside the award on the ground of alleged misconduct of the arbitrator; the application was refused; judgment was given according to the award; upon the judgment so given a decree was passed. From this decree the appellants preferred an appeal. *Held*, unless it is shown that the award is illegal *ab initio* or in other words where there is no award in law, no appeal lies from a decree following a judgment given according to an award. *Nandram Daluram* v. *Nemchand Jadarchand, I. L. R. 17 Bom. 557*, approved. *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee, I. L. R. 25 Calc. 141*, referred to. WALJI MATHURADAS v. ERJI UMERSEY (1905). I. L. R. 29 Bom. 285

ARREARS OF REVENUE.

See SALE FOR ARREARS OF REVENUE.

ARREST.

See CRIMINAL PROCEDURE CODE.

ARTICLES OF ASSOCIATION.

See COMPANY.

ASSETS.

See CIVIL PROCEDURE CODE.

ATTACHMENT.

See CIVIL PROCEDURE CODE.
9 C. W. N. 693, 703, 887
I. L. R. 29 Bom. 259, 405

See CRIMINAL PROCEDURE CODE.

See INSOLVENT DEBTORS' ACT.

See PENAL CODE.

See PROVIDENT FUNDS ACT.

ATTEMPT TO COMMIT OFFENCE.

See PENAL CODE.

AUCTION-PURCHASER.

See CIVIL PROCEDURE CODE.

AUCTION-SALE.

See ARBITRATION.

——— *Auction-sale, reversal of—Refund of purchase money, suit for—Civil Procedure Code (Act XIV of 1882), s. 244.*—The right of an auction purchaser to a refund of the purchase-money where the auction-sale has been set aside for irregularity, is not a question arising between the parties to the suit or their representatives and relating to the decree, within the meaning of s. 244 (c) of the Civil Procedure Code: a separate suit for refund of such purchase-money is therefore maintainable. JOTINDRA MOHAN TAGORE v. MAHOMED BASIR CHOWDHRY (1905) . . I. L. R. 32 Calc. 332

AWARD.

See APPEAL.

See ARBITRATION.

See BOMBAY CITY IMPROVEMENT ACT (IV OF 1898).

See CIVIL PROCEDURE CODE.
I. L. R. 27 All. 459, 526

See HIGH COURT. . 9 C. W. N. 96

B

BABUANA PROPERTY.

See GRANT.

BAIL.

——— right to—

See CRIMINAL PROCEDURE CODE.

See CUSTODY, DETENTION IN.
9 C. W. N. 80

BANKER AND CUSTOMER.

——— *Mortgage payment—Mortgage held by banker against customer—Payment from customer's current account—Banker's duty—Interest—Privy Council—Practice—Transcript, preparation of—Inclusion of irrelevant matter.*—In the absence of special direction to that effect a banker is not bound to pay off a mortgage, which he has against his customer, from the latter's current account, and interest is properly charged upon it, until the customer directs that the principal should be paid off. THAKUR JAWAHIR SINGH v. LACHMAN DAS (1905).
9 C. W. N. 745

BASTU LAND.

See ENHANCEMENT OF RENT.

BENAMI TRANSACTION.

See CIVIL PROCEDURE CODE.

See NEGOTIABLE INSTRUMENTS ACT.
I. L. R. 28 Mad. 244

——— *Apparent title in one person—Beneficial title in another, how proved—Burden of proof—Acquisition out of funds supplied b alleged beneficiary, necessity to prove—Possession*

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

upon. *Per* PARGITER, *J.*—The difference between s. 103 of the old Act and the present section is, that under the former, the Revenue Officer was to record the particulars specified in s. 102; but under the present Act s. 103 gives an applicant the right to select what particulars he may wish to have recorded. If the applicant asks that all or almost all particulars mentioned in s. 102 be recorded, that would constitute a "Record-of-rights"; but if only the particulars mentioned in cls. (*a*) and (*c*) of s. 102 be recorded, they not involving any rights, the record could hardly be called a "Record-of-rights." SUDHENDU NARAIN ACHARJYA CHOWDHRY *v.* GOBINDA NATH SIRCAR (1905) I. L. R. 32 Calc. 518 s.c 9 C. W. N. 504

——— s. 104—*Revenue Officer—Bengal Tenancy Amendment Act (III of 1898), s 9—"Every settlement of rent or decision of a dispute by a Revenue Officer"—Settlement Officer, jurisdiction of*—The words "every settlement of rent or decision of a dispute by a Revenue Officer" are applicable only to those cases which a Revenue Officer has jurisdiction to try, and are not applicable to a decision of a Settlement Officer as to the validity of a *lakhiraj* title under s. 104 of the Bengal Tenancy Act of 1885. RADHA KISHORE MANIKYA *v.* DURGANATH BHUTTACHARJEE (1905), I. L. R. 32 Calc. 162

——— ss. 107, 109—*Undisputed entry—Presumption of accuracy, how rebutted.*—The presumption under s. 109 of the Bengal Tenancy Act (VIII of 1885) in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate. S. 109 of the Bengal Tenancy Act lays down a rule of evidence; it does not override the rules of *res judicata*, which are of general application. GHANESHAM MISSER *v.* PADMANAND SINGH (1905) . . . . I. L. R. 28 Calc. 338 s.c. 9 C. W. N. 610

——— ss. 149, 153—*Title suit—Landlord and tenant, relationship of—Deposit of rent—Right of suit—Revision—Error of law—Civil Procedure Code (Act XIV of 1882), s. 622.*—A suit contemplated by s. 149 of the Bengal Tenancy Act is a suit with reference to the money deposited in Court and for an injunction restraining the paying out of the money. The section does not contemplate a suit for establishment of the relationship of landlord and tenant between the parties. Where a District Judge acted in contravention of the powers vested in him by the proviso to s. 153 of the Bengal Tenancy Act by interfering with the judgment of the Munsif on a question of law, the District Judge acted without jurisdiction and the High Court can revise his order. HORANANDA BANERJEE *v.* ANANTA DASI (1905). 9 C. W. N. 492

——— s. 153—*Appeal—Second Appeal—Suit for rent in kind—Interest—Damages—Landlord and tenant.*—A question in a rent-suit whether rent is payable in money or kind is a question as to the amount of rent annually payable within the meaning of s. 153 of the Bengal Tenancy Act. APURBA KRISHNA ROY *v.* ASUTOSH DUTT (1905) . . . . . 9 C. W. N. 122

——— s. 153—*Appeal from order.—Held* by the Full Bench, RAMPINI, *J.*, dissenting:—An order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls within the proviso to s. 153 of the Bengal Tenancy Act and is appealable, although there could be no appeal from the decree in the suit on account of the prohibition contained in that section. KALI MANDAL *v.* RAMSARBASWA CHAKRAVARTI (1905). . . . . I. L. R. 32 Calc. 957 s.c. 9 C. W. N. 721

——— s. 153—*Order setting aside sale—High Court—Revision, power of—Civil Procedure Code (Act XIV of 1882), s. 622.*—An order setting aside a sale in execution of a decree decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto, and is therefore appealable under s. 153 of the Bengal Tenancy Act (VIII of 1885), although it was made by an officer specially authorized under the section in a suit for rent valued at less than fifty rupees. In deciding whether an order is appealable under that section the point for consideration is not what that decree in the suit decided, but what the order decided. *Monmohiny Dasi* v. *Lakhinarain Chandra, I. L. R. 28 Calc. 116,* distinguished. Where a Court rejects an application under ss. 244 and 311 of the Civil Procedure Code on the ground that the applicant had no *locus standi*, the case would not fall within s. 622 of the Code. GANGA CHARAN BHATTACHARJEE *v.* SHOSHI BHUSAN ROY (1905) . . . . I. L. R. 32 Calc. 572.

——— ss. 160 (g), 167—*Protected interest—Incumbrance—Service of notice—Annulment of incumbrance.*—A *patni kabuliat* contained the following clause: "If I should let out this mehal in *dur-patni* to any person, such *dur-patnidar* shall act according to the terms of my *kabuliat:*" *Held*, that even assuming that the *patni patta* contained the counterpart of the clause, the words did not amount to an express or implied permission to create a sub-tenure, and the knowledge of the proprietor of the creation of the sub-tenure and the acceptance by him of the rent of the *patni taluk through the* sub-tenure-holder was not sufficient to constitute the sub-tenure a protected interest within the meaning of s. 160 of the Bengal Tenancy Act. MAHAMMAD KAEM *v.* NAFFAR CHANDRA PAL (1905) . . . . 9 C. W. N. 803

——— s. 165—*Decree for rent—Tenure or holding, sale of—Landlord and tenant.*—A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under s. 165 of the Bengal Tenancy Act to sell the tenure in execution of the decree, although he recognized the fact that the tenants had subdivided the tenure and

BENAMI TRANSACTION—*concluded*

presumption of title from—Evidence Act (I of 1872) ss 21, 110—Admission—Plaintiffs brought this suit to recover a certain coffee garden from their paternal uncle, the defendant Plaintiffs' father and the defendant had separated and partitioned their ancestral property in 1870, but after their father's death in 1886, the plaintiffs who were young, had lived in the defendant's protection The plaintiffs' case was that the disputed garden had belonged to their father Previous to the suit one of the plaintiffs alone but describing himself as the guardian of his minor brother, had executed a sale deed in favour of the defendant, in which the disputed property was described as having been enjoyed by plaintiffs' father and as belonging to the plaintiffs after his death It was nobody's case that this was a real sale The High Court in decreeing the suit in plaintiff's favour relied *inter alia* on this document as containing an important admission of plaintiffs title in the property: *Held*, that the High Court was right in so using the document that in order to displace this apparent title in the plaintiffs and to establish a beneficial title in himself, it was incumbent upon the defendant to show by satisfactory evidence that the funds out of which the garden was purchased and developed, were his own funds. PULI VAMPATTI NARAYIER v KUPPIER (1905) 9 C W N 89

———*Hindu Law—Will—Unregistered memorandum of an oral gift—Subsequent disposal by will—Presumption of advancement—Indian Trusts Act (II of 1882), s 82—Transfer of Property Act (IV of 1882), s 123*—According to the law as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife, or of an advancement for her benefit *Per* BATTY, *J.*—In India, as a general rule, the criterion as to ownership of property is the source from which the purchase-money was supplied, but it is not the sole criterion, and depends on the presence or absence of rebutting circumstances Among Hindus the grounds against assuming advancement are specially unfavourable to the claim of a widow to an absolute estate. RAI MOTIYAHOO v PURSHOTAM DAYAL (1905) I L R 29 Bom. 306

BENGAL ACT

——— 1868—VIII.

See LANDLORD AND TENANT ACT

——— 1870—VI

See CHAUKIDARI CHAKRAN LAND I L R. 32 Calc 1107

——— 1879—I.

See CHOTA NAGPUR LANDLORD AND TENANT ACT

——— 1880—VI

See BENGAL DRAINAGE ACT

BENGAL ACT—*concluded*

——— 1880—IX.

See CESS ACT

——— 1895—I.

See PUBLIC DEMANDS RECOVERY ACT

——— 1899—III.

See CALCUTTA MUNICIPAL ACT

——— 1902—II.

See BENGAL DRAINAGE ACT (VI OF 1880) AMENDMENT ACT

BENGAL DRAINAGE ACT (BENGAL ACT VI OF 1880, II OF 1902)

———ss. 42, 44B (b)—*Drainage, recovery of cost of—Contract—Illegality—Contract Act (IX of 1872), s 23*—There is nothing in the Drainage Acts to render invalid a contract between a landlord and tenant, by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed in consequence of any scheme of works carried out under the Acts benefiting it. S 44B of the Act (as amended by Bengal Act II of 1902) does not apply where the plaintiff seeks to recover under a contract. JYOTI KUMAR MUKERJEE v HARI DAS MAITRI (1905) I L R. 32 Calc. 1019

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT XII OF 1887)

See MARRIAGE 9 C W N. 323

——— ss 8, 10, 11, 12 (3), 22—*District Judge—Additional Judge—Transfer of part heard appeal to Additional Judge legality of—Assignment of "functions" to such Judge—Civil Procedure Code (Act XIV of 1882), s 25*—A District Judge has no jurisdiction under s 8 of the Bengal, North Western Provinces and Assam Civil Courts Act, to transfer a case partly heard before himself to an Additional Judge for disposal. Where, therefore, the District Judge admitted an appeal, heard the arguments and reserved judgment on a certain date, but on the next day, upon the application of the appellant, deputed an amin and a pleader to make a survey and identify some lands, to prepare a map and to take certain evidence and after the receipt of their report fixed a date for further hearing, but ultimately transferred the appeal to the Additional Judge for disposal, *Held*, that the order of transfer was without jurisdiction. *Kumarasami Reddiar v Subbaraya Reddiar, I L R 23 Mad 514; Sita Ram v Narain Dalaya, I L R 21 All 230; Dumree Sahoo v Jugdharee 18 W R 398; Maulvi Abdool Hye v Macrae, 23 W R 1, Kishori Mohun Sett v Gul Mahomed Shaha, I L R 15 Calc 177*, referred to. A District Judge may under s. 8 assign to the Additional Judge the function of hearing any particular class of cases, but it is extremely doubtful whether he can transfer to such Judge any particular

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887)—*concluded.*

case pending before himself. BIDYA MOYEE DEBYA CHOWDHURANI *v.* SURJA KANTA ACHARJI (1905).
I. L. R. 32 Calc. 875
9 C. W. N. 705

BENGAL, NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT (XII OF 1887).

See BENGAL, AGRA AND ASSAM CIVIL COURTS ACT.

BENGAL REGULATION VIII OF 1819.

See APPEAL.
I. L. R. 32 Calc. 572, 957

See DECREE . I. L. R. 32 Calc. 630

See DECREE, EXECUTION OF.
I. L. R. 32 Calc. 972

See DEPOSIT IN COURT.
I. L. R. 23 Calc. 107

See EVIDENCE . I. L. R. 32 Calc. 710

See INTEREST, RATE OF.
I. L. R. 32 Calc. 258

See JURISDICTION.
I. L. R. 32 Calc. 162

See LANDLORD AND TENANT.
I. L. R. 32 Calc. 395

See LIMITATION I. L. R. 32 Calc. 169

See OCCUPANCY RIGHT, TRANSFER OF.
I. L. R. 32 Calc. 386

See OFFENCE . I. L. R. 32 Calc. 816

See RECORD OF RIGHTS.
I. L. R. 32 Calc. 336
I. L. R. 32 Calc. 518

See SALE FOR ARREARS OF RENT.
I. L. R. 32 Calc. 911
I. L. R. 32 Cal. 953

See SUIT . . I. L. R. 32 Calc. 422

BENGAL REGULATION XI OF 1825.

——— s. 4, paras. 1 and 2—*Oudh Laws Act (XVIII of 1876)—Accretion—Riparian proprietors—Change in course of river—Gradual and imperceptible accretion—Alteration of land by sudden change of course of river or by violence of its stream—Ownership not changed—Tidal and non-tidal rivers.*—The appellant sued to recover possession of a large extent of land, which she claimed as an accretion to her estate of Kamyar lying on the south side of the river Gogra, a non-tidal river, by reason of a change in the channel of the river the effect of which was, as stated in the plaint, that "the northern channel receding gradually to the north the said land was added to Kamyar as alluvial accretion towards the south of the said channel." It was found by the Judicial Committee that the predecessors of the respondent were the original owners of the land claimed; that there had been no slow and gradual pushing northward of the northern boundary of the appellant's land; and that there was still a channel of the river between the properties of the appellant and respondent, although the main stream had shifted to the north. *Held*, that it was not a case of accretion by gradual slow and imperceptible means, in which, as laid down in *Lopez* v. *Muddun Mohan Thakur, 13 Moore's I. A. 467; 5 B. L. R. 521*, the accreted land belongs to the owner of the adjoining land; but the principle applicable to it was that laid down in para. 2 of s. 4 of Regulation XI of 1825 (which was applied to Oudh by Act XVIII of 1876), that in cases in which a river by a sudden change in its course or by the violence of its stream separates land from one estate and joins it to another without destroying its identity and preventing the recognition of the land so removed, in such cases the land on being clearly recognized remains the property of the original owners—in this case the respondents. *Mayor of Carlisle* v. *Graham, L. R. 4 Exch. 361*, followed. The principle of that case, which had reference to a tidal river, is equally applicable to a non-tidal river. RITRAJ KUNWAR *v.* SARFARAZ KUNWAR (1905).
I. L. R. 27 All. 658

BENGAL TENANCY ACT (VIII of 1885).

See LANDLORD AND TENANT.
9 C. W. N. 96

——— s. 7—*Enhancement of rent—Fair and equitable rent—Construction of lease.—Held*, upon a construction of the *kabuliat* in the present case, that the tenant's liability to pay an enhanced rent under s. 7 of the Bengal Tenancy Act has not been in any way restricted by the *kabuliat*. Where in a suit for enhancement of rent under s. 7 of the Bengal Tenancy Act the rent assessed by the lower Court amounted to 70 per cent. on the net assets after deducting collection charges, and therefore 30 per cent. was left as the tenure-holder's net profits, but the rent was thereby nearly trebled: *Held*, that the rent settled was somewhat larger than what was fair and equitable. RAM KUMAR SINGH *v.* WATSON & Co. (1905) . . . . . 9 C. W. N. 334

——— s. 21—*Occupancy, right of—Occupancy right may be acquired in urban area—Village—Act X of 1859—Bengal Act VIII of 1869.*—A tenancy is found to have existed for at least 50 years in respect of a piece of land, which was used for agricultural or horticultural purposes and which is situated within the limits of the Dacca Municipality: *Held*, that even if the Bengal Tenancy Act has no operation in urban areas, the tenant had acquired a right of occupancy before the passing of the Bengal Tenancy Act, under the repealed Acts X of 1859 and VIII of 1869. *Semble*—The term "village" as defined in s. 3, sub-s. (10) of the Bengal Tenancy Act is not confined to non-urban areas. The Act applies to urban areas

BENGAL TENANCY ACT (VIII OF 1885)—*continued*

outside the town of Calcutta It has no operation as regards homestead lands, whether situated in towns or outside towns HASSAN ALI v GOBINDA LAL BASAK (1905) 9 C. W N. 141

——— s. 22, sub s. 2—*Purchase of an occupancy holding by a co sharer landlord—Termination of occupancy right—Held* by the Full Bench (RAMPINI, J, dissenting)—The result of a purchase by a co sharer landlord of the occupancy holding of a tenant will not be the termination of the tenancy right altogether but only of his occupancy right in the holding *Jawadul Huq v Ram Das Saha, I L R 21 Calc 143*, approved RAM MOHAN PAL v SHEIKH KACHU (1905) 9 C W. N. 249

——— s 23

See SPECIFIC RELIEF ACT, s 54. 9 C W. N 87

——— s 29, cl (b)—*Proviso (1)—Enhancement of rent by more than 2 annas in the rupee—Continuous repayment for more than 3 years at a higher rate—Suit on kabuliat—Pleadings—Issues*—Proviso (1) to s 29 of the Bengal Tenancy Act does not control sub-s (b) of that section. *Mathura Mohan Lahiri v Vale Sarkar, I L R 25 Calc 784*, distinguished. BEPIN BEHARI MONDAL v KRISHNA DHONE GHOSE (1905) 9 C W N 285

——— ss. 61, 182—*Deposit of rent by a tenant of homestead land, who is also a raiyat of the village, but under a different landlord.*—Plaintiff brought a suit for rent of a plot of *basta* land from the defendant, who was a *raiyat* of the village under another landlord. The defendant pleaded that, owing to a dispute between rival landlords, he had deposited the rent under s. 61 of the Bengal Tenancy Act and that there was a full acquittance by the deposit. *Per* GHOSE, J—It was not necessary to decide in the case whether the defendant was a *raiyat* under s 182 of the Bengal Tenancy Act and whether a deposit could be made under s 61 The deposit had been made in fact, and the question, which remained for determination, was as to who amongst the rival landlords was entitled to the money made available by the deposit The present suit was therefore liable to be dismissed. *Per* GUPTA, J—The suit was liable to be dismissed because s 182 of the Bengal Tenancy Act applied and the deposit under s 61 was a valid deposit PROTAP CHANDRA DAS v RISHESWAR PRAMANIC (1905) 9 C W. N. 418

——— ss 65, 159, 188—*Co-sharer landlords—Agreement to pay rent separately—Suit for whole rent brought by a co sharer, making others defendants—Maintainability—Contract, rescission of—Joint contractors—Avoidance for breach—Failure of consideration*—Where a whole body of co-sharer landlords and their tenants have come to an arrangement by which rent is made payable to the co-sharers separately in proportion to their shares in the

BENGAL TENANCY ACT (VIII OF 1885)—*continued*

estate, it is not competent for one of the co-sharers, so long as such arrangement subsists, to bring a suit for the full rents of the tenure by making his co-sharers parties defendants in the suit PROMODA NATH ROY v RAMONI KANTO ROY (1905) 9 C. W. N 34

——— s. 67.

See CIVIL PROCEDURE CODE s 13. 9 C. W. N. 466

——— s 67—*Kabuliat, rate of interest mentioned in—Purchaser at auction sale liability of, to pay interest*—*A* purchased at an auction sale in execution of a rent decree a tenure covered by a *kabuliat*, which stipulated for interest at a specified rate—*Held*, that the tenure being subsisting *A* bought the tenure subject to the terms and conditions of the lease, and was liable for interest at the rate mentioned in the *kabuliat*, and not at the rate mentioned in s 67 of the Bengal Tenancy Act. LAL GOPAL DUTTA CHOWDHRY v MANMATHA LAL DUTT CHOWDHRY (1905) I. L. R. 32 Calc. 258 s c 9 C. W. N. 175

——— s. 68—In a suit for rent in kind plaintiff is not entitled to damages at a higher rate than 25 per cent. under s 68 of the Bengal Tenancy Act APURBA KRISHNA ROY v ASUTOSH DUTT (1905) 9 C. W. N. 122

——— s. 74.

See CIVIL PROCEDURE CODE, s 13 9 C. W. N. 469

——— s. 84—*Acquisition of land by landlord for building purpose—Right to apply—Increase of revenue—Sufficiency and reasonableness of purpose—Collector's certificate not conclusive*—A person, who is not the immediate landlord of a holding, cannot make an application for acquisition of land under s 84 of the Bengal Tenancy Act Where the lower Court ordered the acquisition of land under s 84 of the Bengal Tenancy Act on the ground that by the acquisition the revenue would be increased and consequently it would be for the improvement of the estate *Held*, that the purpose was not reasonable and sufficient within the meaning of s 84 The Collector's certificate as to whether the purpose is reasonable is not conclusive, the Civil Court should hold an enquiry as to the reasonableness and sufficiency NARAIN MANTO v TEHAIT BRIJO BEHARI SINGH (1905) 9 C. W. N. 472

——— ss. 101, 103—*Settlement Officer, jurisdiction of*—The particulars specified in s 102 of the Bengal Tenancy Act, when recorded and compiled under s 103, amount to a "Record-of Rights" as contemplated in Chapter X of the Act; and proceedings taken by a Revenue Officer, after making a record of the particulars under s 103, including those under s 105 of the Act, are not therefore void for want of jurisdiction *Dharani Kanta Lahiri v Gaber Ali Khan, I L R 3 Calc 339*, relied

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

upon. *Per* PARGITER, *J.*—The difference between s. 103 of the old Act and the present section is, that under the former, the Revenue Officer was to record the particulars specified in s. 102; but under the present Act s. 103 gives an applicant the right to select what particulars he may wish to have recorded. If the applicant asks that all or almost all particulars mentioned in s. 102 be recorded, that would constitute a "Record-of-rights"; but if only the particulars mentioned in cls. (*a*) and (*c*) of s. 102 be recorded, they not involving any rights, the record could hardly be called a "Record-of-rights." SUDHENDU NARAIN ACHARJYA CHOWDHRY *v.* GOBINDA NATH SIRCAR (1905) I. L. R. 32 Calc. 518 s.c 9 C. W. N. 504

——— s. 104—*Revenue Officer—Bengal Tenancy Amendment Act (III of 1898), s 9—"Every settlement of rent or decision of a dispute by a Revenue Officer"—Settlement Officer, jurisdiction of*—The words "every settlement of rent or decision of a dispute by a Revenue Officer" are applicable only to those cases which a Revenue Officer has jurisdiction to try, and are not applicable to a decision of a Settlement Officer as to the validity of a *lakhiraj* title under s. 104 of the Bengal Tenancy Act of 1885. RADHA KISHORE MANIKYA *v.* DURGANATH BHUTTACHARJEE (1905), I. L. R. 32 Calc. 162

——— ss. 107, 109—*Undisputed entry—Presumption of accuracy, how rebutted.*—The presumption under s. 109 of the Bengal Tenancy Act (VIII of 1885) in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate. S. 109 of the Bengal Tenancy Act lays down a rule of evidence; it does not override the rules of *res judicata*, which are of general application. GHANESHAM MISSER *v.* PADMANAND SINGH (1905) . . . . I. L. R. 28 Calc. 336 s.c. 9 C. W. N. 610

——— ss. 149, 153—*Title suit—Landlord and tenant, relationship of—Deposit of rent—Right of suit—Revision—Error of law—Civil Procedure Code (Act XIV of 1882), s. 622.*—A suit contemplated by s. 149 of the Bengal Tenancy Act is a suit with reference to the money deposited in Court and for an injunction restraining the paying out of the money. The section does not contemplate a suit for establishment of the relationship of landlord and tenant between the parties. Where a District Judge acted in contravention of the powers vested in him by the proviso to s. 153 of the Bengal Tenancy Act by interfering with the judgment of the Munsif on a question of law, the District Judge acted without jurisdiction and the High Court can revise his order. HORANANDA BANERJEE *v.* ANANTA DASI (1905). 9 C. W. N. 492

——— s. 153—*Appeal—Second Appeal—Suit for rent in kind—Interest—Damages—Landlord and tenant.*—A question in a rent-suit whether rent is payable in money or kind is a question as to the amount of rent annually payable within the meaning of s. 153 of the Bengal Tenancy Act. APURBA KRISHNA ROY *v.* ASUTOSH DUTT (1905) . . . . . 9 C. W. N. 122

——— s. 153—*Appeal from order.—Held* by the Full Bench, RAMPINI, *J.*, dissenting:—An order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls within the proviso to s. 153 of the Bengal Tenancy Act and is appealable, although there could be no appeal from the decree in the suit on account of the prohibition contained in that section. KALI MANDAL *v.* RAMSARBASWA CHAKRAVARTI (1905). . . . . I. L. R. 32 Calc. 957 s.c. 9 C. W. N. 721

——— s. 153—*Order setting aside sale—High Court—Revision, power of—Civil Procedure Code (Act XIV of 1882), s. 622.*—An order setting aside a sale in execution of a decree decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto, and is therefore appealable under s. 153 of the Bengal Tenancy Act (VIII of 1885), although it was made by an officer specially authorized under the section in a suit for rent valued at less than fifty rupees. In deciding whether an order is appealable under that section the point for consideration is not what that decree in the suit decided, but what the order decided. *Monmohiny Dasi v. Lakhinarain Chandra, I. L. R. 28 Calc. 116*, distinguished. Where a Court rejects an application under ss. 244 and 311 of the Civil Procedure Code on the ground that the applicant had no *locus standi*, the case would not fall within s. 622 of the Code. GANGA CHARAN BHATTACHARJEE *v.* SHOSHI BHUSAN ROY (1905) . . . . I. L. R. 32 Calc. 572.

——— ss. 160 (g), 167—*Protected interest—Incumbrance—Service of notice—Annulment of incumbrance.*—A *patni kabuliat* contained the following clause: "If I should let out this mehal in *dur-patni* to any person, such *dur-patnidar* shall act according to the terms of my *kabuliat*:" *Held*, that even assuming that the *patni patta* contained the counterpart of the clause, the words did not amount to an express or implied permission to create a sub-tenure, and the knowledge of the proprietor of the creation of the sub-tenure and the acceptance by him of the rent of the *patni* taluk through the sub-tenure-holder was not sufficient to constitute the sub-tenure a protected interest within the meaning of s. 160 of the Bengal Tenancy Act. MAHAMMAD KAEM *v.* NAFFAR CHANDRA PAL (1905) . . . . 9 C. W. N. 803

——— s. 165—*Decree for rent—Tenure or holding, sale of—Landlord and tenant.*—A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under s. 165 of the Bengal Tenancy Act to sell the tenure in execution of the decree, although he recognized the fact that the tenants had subdivided the tenure and

BENGAL TENANCY ACT (VIII OF 1885)—*continued*

chose to accept a decree making each of them separately liable for his own share of the rent. *Tarini Prosad Roy v Narayan Kumari Debi, I L R 17 Calc 301*, referred to and explained. SURBO LALL v J. M WILSON (1905) I. L. R. 32 Calc 680

——— s. 167.

See TRANSFER OF PROPERTY ACT, s. 73. 9 C W. N. 117

——— s. 171—*Rent—Payment to prevent sale.*—Where a decree made in a suit for rent was in the main one for rent, although it included other sums, which were not strictly rent, within the meaning of the Bengal Tenancy Act, and in execution thereof the tenure in area was ordered to be sold under Chapter XIV of the Act and advertised *Held*, that the holder of an under tenure liable to be avoided would be justified in making a payment to prevent the sale of the superior tenure and having made the payment, would be entitled to the rights, which are given to a person, who makes a payment under s. 171 of the *Bengal Tenancy Act*. A lease provided that a certain sum was payable by a tenant direct to the landlord as *malikana* and certain other sums were payable by the tenant for Government revenue and other demands, which the landlord was himself bound to pay *Held*, that the latter sums, though not actually payable to the landlord, were payable for the use and occupation of the land held by the tenant, and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord, and came within the definition of rent in s. 3 of the Bengal Tenancy Act. JNANADA SUNDARI CHOWDHRANI v ATUL CHANDRA CHAKRAVARTI (1905) . I. L. R. 32 Calc 972

——— s. 173.

See CIVIL PROCEDURE CODE, s 244. 9 C W N. 134

See TRANSFER OF PROPERTY ACT s 73. 9 C. W. N. 117

——— s. 178—*Landlord and tenant—Mokurari lease—Abatement of rent—Diluvion—Bengal Tenancy Act (VIII of 1885), ss 52, 178, 179*—A tenant holding under a permanent *mokurari* lease is not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river NANDA LALL MUKHERJEE v KYMUDDIN SARDAR (1905) . . . 9 C. W N 888

——— s. 181.

See CHOWKIDARI CHAKRAN LAND 9 C. W. N. 571

——— s. 188—*Co-owner, possession by—Adverse possession—Management, when adverse*—Possession or occupation of the property by one co-sharer does not constitute adverse possession against the other co-sharer. *Management* of joint property on behalf of some of the co-owners without any assertion of hostile title does not constitute adverse possession against the other co-owner UJALBI BIBEE v UMAKANTA KARMOKAR (1905) 9 C. W. N. 32

BENGAL TENANCY ACT (VIII OF 1885)—*concluded*

——— Sch. III, Art. 2 (b).

See LANDLORD AND TENANT 9 C. W. N. 96

——— Sch. III, Art. 3—*Occupancy raiyat, suit for possession by—Dispossession by tenant set up by landlord—Limitation—Civil Procedure Code (Act XIV of 1882), ss 562, 566—Appellate Court—Power—Remand, order of, where decision of Subordinate Court on merits—Remand of particular issues only allowable*—Where an occupancy raiyat is dispossessed by a person, whom the landlord has set up as tenant, the dispossession being really by the landlord—the limitation applicable to a suit for recovery of possession by the raiyat is that prescribed in Art 3 of Sch. III of the Bengal Tenancy Act. *Ranjulla v. Ishad Dhali, 6 C W. N. 702; s c I L. R 29 Calc 610*, distinguished. HARHIT MAHANTA v PUDDO BAURI (1905) 9 C W. N. 54

——— Sch. III, Art. 6—*Execution of decree—Limitation Act (XV of 1877) s 19—Acknowledgment of liability.*—An acknowledgment of liability under s. 19 of the Limitation Act made by a judgment-debtor to the decree holder's right to execute a rent decree gives the decree-holder a fresh starting point for counting the period of limitation prescribed by Art. 6 of Sch. III of the Bengal Tenancy Act HARDHAR LAL v GOVERNDAR PERSHAD (1905) . . 9 C W. N 1025

BENGAL TENANCY AMENDMENT ACT (BENGAL ACT III OF 1898).

——— s. 9

See JURISDICTION I. L. R. 32 Calc. 162

BEQUEST.

See HINDU LAW, WILL.

BIAS.

See CRIMINAL PROCEDURE CODE

BOMBAY ACTS.

——— 1874—I.

See BOMBAY TRAMWAYS ACT

——— 1876—X.

See BOMBAY REVENUE JURISDICTION ACT

——— 1877—XVI.

See BOMBAY REVENUE JURISDICTION ACT

BOMBAY ACTS—*concluded.*

——— 1879—V.

See LAND REVENUE CODE.

——— 1887—IV.

See BOMBAY PREVENTION OF GAMBLING ACT.

——— 1888—III.

See BOMBAY MUNICIPAL ACT.

——— 1898—IV.

See BOMBAY CITY IMPROVEMENT ACT.

——— 1901—III.

See BOMBAY DISTRICT MUNICIPAL ACT.

——— 1904—XIV.

See BOMBAY IMPROVEMENT ACT.

BOMBAY CITY IMPROVEMENT ACT, BOMBAY ACT XIV OF 1904 (IV OF 1898).

———*Trustees for the improvement of the City of Bombay—Acquisition of property—Scheme of development—Portion fully developed—Portion capable of further development—Rental capitalized at 16¾ and 16 years' purchase—Six per cent. investment—Allowance for the risk attendant upon scheme of development.*—A certain property was acquired by the trustees for the Improvement of the City of Bombay under the powers of the City of Bombay Improvement Act. The said property, though a single parcel, was treated by the Tribunal of Appeal as falling under two categories, that part which abutted the street was regarded as fully developed and the portion lying at the back as capable of further development. The rental for the front part was capitalized by the Tribunal at 16¾ years' purchase and the back portion at 16 years' purchase. The scheme of development provided for the erection of four blocks of chawls running practically at right angles to the front premises and these chawls were to have three upper floors for residential purposes, while in each case the ground floor was to be used for godowns. Against the decision of the Tribunal the claimants appealed, urging that the Tribunal ought to have allowed four upper floors to the hypothetical chawls and that it was wrong in allowing only 16¾ and 16 years' purchase. The trustees also preferred a cross-objection that the allowance made by the Tribunal of ¾ year's rental was not sufficient for the risk attendant upon a scheme of development such as that adopted by it on the basis of its award. *Held*, confirming the decision of the Tribunal on all points, that (1) it cannot be said that the scheme of development involving four upper floors was so obvious that it would enter into the calculations of an intending purchaser and influence his offer; (2) the Tribunal's estimate of 16¾ years' purchase for the front and 16 years' purchase for the back premises was fair and reasonable, the difference between 16¾ years' purchase and 16 years' purchase was due to the allowance of ¾ year's rental as a reward for the enterprise and compensation for risks so that the purchase was treated as a 6 per cent. investment; (3) the allowance made by the Tribunal at ¾ year's rental for the risk attending upon the proposed scheme of development was adequate. ANANDRAV VINAYAK *v.* SECRETARY OF STATE (1905). I. L. R. 29 Bom. 565

———s. 48 (11)—*Land Acquisition Act (I of 1894)—Acquisition of land with buildings thereon—Compensation—Net rental—Number of years' purchase—Award by Tribunal of Appeal—Appeal—Cross objections—Civil Procedure Code (Act XIV of 1882), s. 561.*—S. 48 (11) of the City of Bombay Improvement Act does not provide for leave to appeal being granted to any individual, but for a certificate that the case is a fit one for appeal, that is, the whole case and not any particular part of it. The consequence of the grant of the certificate is that there shall be an appeal to the High Court from the award or any part of the award, and this must mean that there shall be a right to appeal or, to use the language of the Civil Procedure Code (Act XIV of 1882), an appeal will lie to the High Court and the respondents will be entitled to object in the manner provided by s. 561 of the Code. *Per* JENKINS, *C. J.*—The enquiry is essentially one where experience is of the greatest use, and in this respect the Tribunal is in a far stronger position than this Court. It has been in existence and at work now for some years, and though its members have changed from time to time, still it must have gained from the multiplicity of cases that have come before it an insight into the value of land in Bombay, which we do not possess, and an experience which must make this Court slow to interfere with its adjudication on a question of value, involving no legal principle, in the absence of evident error. And all the more must this be so when regard is had to the constitution of the Tribunal. RAGHUNATHDAS *v.* SECRETARY OF STATE (1905) . . . . I. L. R. 29 Bom. 514

BOMBAY CITY MUNICIPAL ACT (BOMBAY ACT III OF 1888).

——— ss. 231 and 471—*Municipal Commissioner—Notice to construct drains—Effect of negotiations—Limitation.*—Accused was convicted and fined R25 for not complying with a notice issued by the Municipal Commissioner of Bombay under s. 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building. *Held* (reversing the conviction and sentence), that the notice was *ultra vires*, inasmuch as it required the accused to construct a drain adjoining a particular part of his premises. *Held*, that on a notice being served by the Municipal Commissioner of Bombay, under s. 231 of Bombay Act III of 1888, if negotiations ensue, which are tantamount to a request by the party served with the notice, and a

BOMBAY CITY MUNICIPAL ACT (BOMBAY ACT III OF 1888)—*concluded*

consent by the Commissioner to reconsider the matter, such negotiations will have the effect of waiving the notice, and it is competent to the Commissioner to issue a *fresh notice after the negotiations have closed* Limitation in this event under s 514 of the Municipal Act will not run from the original notice EMPEROR v NARSINHA (1905)
I. L. R. 29 Bom. 35

———— s. 394—*Storing of oil—What amounts to "storing"*—*The wording of s 394 of the* City of Bombay Municipal Act requires that the premises, in order to attract the operation of the section, should be used for the purpose of storing The phrase "for the purpose" indicates that it must be the intention of those using the premises to store, that storing must be the object aimed at—the final cause for which the premises are used. There is nothing in the exemption which sub-s. 3 declares in favour of the mills specified to imply that sub-s. 1 was *intended* in the *case of premises not so* exempted, to include any *use to which they might be* put, which was merely incidental or subsidiary to the paramount purpose to which the premises are devoted EMPEROR v WALLACE FLOUR MILL COMPANY (1904)
I. L. R. 29 Bom. 193

BOMBAY PREVENTION OF GAMBLING ACT (BOMBAY ACT IV of 1887)

———— ss. 3, 4 (a)—*Instrument of gaming—Single page of paper used for registering wagers*—The expression "instruments of gaming" as defined in s 3 of the Bombay *Prevention of Gambling* Act (IV of 1887) includes a *single page of* paper used *for registering wagers* EMPEROR v LAKHAMSI (1905)
I. L. R. 29 Bom. 264

———— ss. 3, 4, 12—*Gambling in a machhwa—Public place—Bombay Harbour*.—The accused, fourteen in number chartered a *machhwa* (boat) and, having got it anchored in the *Bombay Harbour* a mile away from the land, carried on gambling there. For this they were convicted of an offence under s 12 of the Bombay Prevention of Gambling Act (IV of 1887) for gaming in a public place *Held*, that the accused were not guilty of an offence under s 12 of the Act, since they cannot be said to be gambling in a public place *Per* BARTA, *J*—The word "place," which is patent of many different meanings, must necessarily, in each instance in which it is used by the Legislature be construed with reference to the intention to be inferred from the context. Thus in s. 12 of the Bombay *Prevention of* Gambling Act (IV of 1887), or in s 3 of 36 & 37 Vict., c 33, in connection with *such words as* roads, streets and thoroughfares, it has a very different meaning from that which it bears in s. 4 of the Act, and from that given to it in connection with s 3 of 16 & 17 Vict., c 119 by judicial decisions. The mischief aimed at in s 4 of the Act is a mischief clearly distinct from that aimed at in s 12 of the Act. In the former the mischief aimed at is the practice of individuals making a profit by providing

BOMBAY PREVENTION OF GAMBLING ACT (BOMBAY ACT IV OF 1887)—*concluded*

a spot of their own selection known as a *place where gambling is to be carried on*, and making a livelihood *by attracting people to a place* which they would not otherwise frequent. In the latter the offence is not that the individual members are making a profit at all but simply that they are carrying on their gambling with such publicity that the ordinary passer by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way In the one case *comparative privacy for* profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence S 12 of the Bombay Prevention of Gambling Act (IV of 1887) aims at gambling in a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity EMPEROR v JUSUB ALLY (1905) I. L. R. 29 Bom. 386

———— ss. 4, 5, 7—*Common gaming house—Jamáthkhana of the Borah community*—The accused were found playing for money with cards in a building ordinarily used as a *Jamáthkhána*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room. This place was frequented by the *petitioners* and others and instruments of gaming were found there, *when the accused were arrested* The Magistrate convicted the *accused of offences* under ss 4 and 5 of the Bombay Prevention of Gambling Act (IV of 1887): *Held*, that it was open to the Magistrate to rely on the presumption which under s. 7 of the Act might be drawn, that this place was used as a common gaming house, unless the contrary was made to appear by the evidence before him: there was, therefore, no ground to interfere in revision with the convictions under s. 5 of the Act *Held* further, that no presumption arose under s. 7 of the Act that the place was "kept" by any person as a common gaming house: the conviction under s 4 was *therefore wrong* In order to constitute an *offence under s. 4* of the Bombay Prevention of *Gambling* Act (Bombay Act IV of 1887) of keeping a common gaming house, it is necessary to show in the first place, that the person charged with that offence is the owner or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house It is not sufficient to show that the accused used the place in question for the purpose of gaming there. EMPEROR v WALLI MUSAJI (1905) I. L. R. 29 Bom. 223

BOMBAY REGULATION II OF 1827

———— s. 52—*Vakil's fee—Calculation according to the actual value of the property in suit*.—A vakil's fee should be calculated on the amount of the actual value of the property, the subject-matter of the suit, and not on the amount of the claim as estimated for the purposes of the payment of Court fees. *Per* JENKINS, *C J*—"The principle and rule of taxation ought (in our opinion), as far as possible,

BOMBAY REGULATION II OF 1827—*concluded.*

to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court, and this can best be secured by adopting the actual value as the basis of taxation." BAI MEHERBAI v. MAGANCHAND MOTIJI (1905).
I. L. R. 29 Bom. 229

BOMBAY REVENUE JURISDICTION ACT, X OF 1876 (BOMBAY ACT XVI OF 1877).

See DOCUMENT.

——— s. 4—*"Any other written grant"—Land free from assessment—Treaty—Civil Courts—Jurisdiction—Specific Relief Act (I of 1877), s. 42—Suit for declaration—Consequential relief—Amendment of plaint—Construction of documents.*—In s. 4 of the Bombay Revenue Jurisdiction Act (X of 1876), the clauses (*h*), (*i*), (*j*) and (*k*) are independent of one another: the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso, which precedes clause (*h*). The expression "any other written grant" in clause (*j*) therefore means any written grant other than that which falls within clauses (*h*) and (*i*) of the section. The term "treaty" in s. 4 (*a*) of the Act is not to be broadly construed, but is to be confined in its interpretation to its accepted meaning, *i.e.*, an agreement between two or more independent sovereign powers or states. Generally speaking the name given by the parties to a document is not conclusive as to its nature; but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope. The effect of the amendment by Act XVI of 1877 is that nothing in s. 4 of the Bombay Revenue Jurisdiction Act (X of 1876) shall be held to prevent the Civil Courts in the Districts mentioned in the second schedule annexed to that Act from exercising jurisdiction over claims against Government to hold lands wholly or partially free from payment of land revenue. The plaintiffs filed a suit against the Secretary of State for India in Council for a declaration that they were entitled to hold certain lands free from assessment. The defendant objected that the suit was barred under s. 42 of the Specific Relief Act (I of 1877). After the settlement of the issues in the case, the plaintiffs applied for leave to amend the plaint by adding thereto a prayer for injunction by way of consequential relief. The lower Court refused to grant the prayer. *Held*, that the lower Court should have exercised its discretion in plaintiffs' favour, although the prayer for amendment was made very late, as it was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit. KALABHAI v. SECRETARY OF STATE FOR INDIA (1905) I. L. R. 29 Bom. 19

BOMBAY TRAMWAYS ACT (BOMBAY ACT I OF 1874).

——— s. 30—*Purchase of tramways by Corporation—Arrangement with third persons—Validity—Corporation not bound to work tramways themselves—Liability of Tramway Company to pay track rent after purchase.*—In acquiring the tramways under s. 30 of the Bombay Tramways Act, the Corporation of the City of Bombay were not bound to keep them in their own hands and to work themselves. Although the Corporation had made arrangements with another person so that the latter was to find the money for the purchase and to work the tramways when acquired, yet the Corporation were acting as principals and not as the agents of that person. There was nothing in the Tramways Act which expressly or impliedly prohibited such a transaction. The Tramway Company was liable to pay the ordinary expenses of working the tramways and the track rent for the period (subsequent to acquisition and pending the ascertainment and payment of the purchase-money) during which they had expressly agreed with the Corporation to work the tramways on the understanding that they received the income and profits. BOMBAY TRAMWAY COMPANY, LIMITED v. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (1905) . . . . 9 C. W. N. 337

BOND.

——— *Stamp Act (II of 1899), s. 2 (5) (b)—Promissory Note.*—The defendant passed to the plaintiff a document to this effect: I have this day taken from you in cash R48 (forty-eight). I have received this amount. I shall repay this money without taking any objection, when you should demand [it]." The document was attested by two witnesses. It bore a one-anna adhesive stamp. *Held*, on a construction of the document, that it was a bond within the meaning of s. 2 (5) (*b*) of the Indian Stamp Act (II of 1899); since the document was attested and was not payable to order or bearer, and the executant obliged himself to pay the money to another. VENKU v. SITARAM (1905).
I. L. R. 29 Bom. 82

BREACH OF CONTRACT.

See CONTRACT.

BREACH OF THE PEACE.

See CRIMINAL PROCEDURE CODE.

———*Disobedience of order—Evidence—Penal Code (Act XLV of 1860), s. 188—Criminal Procedure Code (Act V of 1898), s. 144.*—To constitute an offence under s. 188 of the Penal Code of disobedience to an order issued under s. 144 of the Criminal Procedure Code, there must be *definite* evidence on the record to show that such disobedience is likely to lead to a breach of the peace. *Brojo Nath Ghose* v. *Empress*, 4 *C. W. N. 226.* RAM GOPAL DAW v. EMPEROR (1905).
I. L. R. 32 Calc. 793

BUND.

See PUBLIC NUISANCE

BURMESE LAW.

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)

——— *Adoption—Evidence of adoption—Keitima adoption—Date and manner of adoption alleged but not proved—Held* (reversing the decision of the Chief Court of Lower Burma), that the evidence of a *keitima* adoption alleged to have taken place 40 years ago fully proved that the relationship of *keitima* daughter existed between the plaintiff and her alleged adoptive mother and that being so it was a matter of only secondary importance to show when such relationship began MA VE GALE v MA SA YI (1905) I. L. R. 32 Calc 219
L. R. 32 I. A 72

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CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899)

——— ss 448, 628, 629—*Order for demolition—Municipal Magistrate, power of, to make—Power not limited according to value of building—Adjournment costs of—Magistrate's discretion*—The words "a Magistrate" in s. 449 of the Calcutta Municipal Act mean any Magistrate having jurisdiction in Calcutta and includes a Municipal Magistrate An order for demolition made by the Municipal Magistrate under s 449 of the Calcutta Municipal Act was upheld *In the matter of the Corporation of Calcutta v Keshub Chunder Sen, S C W N 142* distinguished A Magistrate is authorised by law to make an order for demolition under s. 449 of the Calcutta Municipal Act, without regard to the value of the building directed to be demolished. An order requiring the accused to pay the costs of an adjournment is one which a Magistrate in his discretion may make under s 344 of the Code of Criminal Procedure Where such an order was found to be not unreasonable under the circumstances of the case, it was not disturbed by the High Court SHEO PROSAD POODAR v CORPORATION OF CALCUTTA (1905) . . 9 C W. N. 18

——— s. 634,

See LIMITATION I. L. R. 32 Calc 277

——— s. 634, cl 6—*"Accrual of the right to sue" in cl 25, s 534 meaning of Limitation*—The words "accrual of the right to sue" in cl. 2, s. 534 of the Calcutta Municipal Act do not mean accrual of the cause of action, but have reference to the expiry of the month's notice under cl. 1 of that section, and the plaintiff will not be barred, if he brings his action within three months from the date, when the month's notice has expired. CORPORATION OF CALCUTTA v SHYAMA CHARAN PAL (1905)
9 C. W. N 217

CALINGULA.

See LIMITATION ACT

CANCELLATION.

——— *Specific Relief Act (I of 1877), s 39—Suit for declaration—Consequential relief—Valuation*—The plaintiff having sued for the cancellation of a sale-deed framed the prayer in the plaint so as to seek a declaration that the sale-deed was fraudulent and for an order to have it cancelled and a copy was sent to the Sub Registrar as provided by s. 39 of the Specific Relief Act (I of 1877) *Held*, that the suit was one for a declaration with a distinct prayer for consequential relief *Karam Khan v Durga Singh, I L R 5 All 331*, dissented from. PARVATIBAI v VISHVANATH (1905) . . I. L. R. 29 Bom. 207

CARRIERS

——— *Common carriers—Foreign carrier contracting in Calcutta, law applicable to—Negligence and misfeasance*—Carriers by sea for hire, are common carriers by the Common Law of England; and, where the contract is made in Calcutta, whatever be the nationality of the carriers, they will be governed by the *lex loci contractus*, which is the Common Law of England. *Mackillican v The Compagnie Des Messageries Maritimes de France, I L R 6 Calc 227*, not followed. Under the English Common Law, a common carrier may protect himself from liability for deliberate acts or misfeasance on the part of himself or his servants, but he must do so by clear, definite unambiguous words Landing goods in rainy weather, instead of delaying delivery, is negligence and not misfeasance HAJEE ISMAIL SAIT v THE COMPANY OF THE MESSAGERIES MARITIMES OF FRANCE (1905).
I. L. R. 28 Mad. 40

CATTLE TRESPASS ACT (I OF 1871).

———s. 10—*Who may seize*—Where an indigo factory supplies the seed, pays for the labour of sowing and gives compensation to raiyats growing indigo on their own land, but no advance in cash is proved to have been made: *Held*, that a servant of the factory is not a person authorised under s. 10 of the Cattle Trespass Act, to seize cattle doing damage to the land BAM HARAN THAKUR v EMPEROR (1905) . 9 C W N 824

CAUSE OF ACTION

See APPEAL

See LETTERS PATENT

See LIMITATION

See MULTIFARIOUSNESS

See PRACTICE

See RES EXCEPTION

See RES JUDICATA.

——— *Suit for "maintenance" of possession—Pleadings—Suit virtually to procure rectification of an erroneous decree*—Plaintiff in a suit for possession as usufructuary mortgagee of 13 bighas had to redeem five prior usufructuary mortgages

CAUSE OF ACTION—*concluded.*

comprising part of 13 bighas mortgaged to him and some 15 bighas in addition : but the decree, which he obtained, was drawn up erroneously and gave the plaintiff a right to the possession of 13 bighas only and not of the whole 28 bighas. Plaintiff never appealed against this decree, nor did he apply in review to have the error in the decree corrected, but he subsequently brought a suit in which he asked, first, for "maintenance" of possession in respect of the 15 bighas and, secondly, for recovery of possession, if he should be found not to be in possession. He alleged in his plaint that he was in possession and that one of the defendants at the instigation of another was interfering with his rights. It was found that plaintiff had never obtained possession of the 15 bighas. *Held*, that the suit did not lie. If the suit was for maintenance of possession no cause of action appeared, and in any other view the suit was one virtually to set right an erroneous decree, which could not be done by means of such a suit. BASAWAN KURMI *v.* NAKCHHEDI PANDE (1905). I. L. R. 27 All. 174

——— *Malicious prosecution—Letters Patent, cl. 12—Leave—Liability of prosecutor when prosecution ordered by Court.*—"Cause of action" means that bundle of essential facts which it is necessary for a plaintiff to prove before he can succeed in the case. A person is responsible not merely for starting a prosecution, but also for continuing the same and he is so responsible whether such prosecution was ordered by the Court or was initiated by the party himself. The plaintiff, a resident in British India, was charged with a criminal offence by the defendant in the Magistrate's Court at Rajkot. In order to secure his attendance the defendant moved the Bombay Government to initiate extradition proceedings against the plaintiff before the Chief Presidency Magistrate in Bombay, who, however, held that a case for extradition had not been made out. The plaintiff obtained leave from the High Court to file a suit against the defendant in Bombay for malicious prosecution. On an application by the defendant to have the leave rescinded. *Held*, that a material part of the cause of action accrued in Bombay and that the High Court had jurisdiction to entertain the suit. *Fitzjohn* v. *Mackinder*, 9 *C. B. N. S. 505, 530, 531*, applied. MUSA YAKUB *v.* MANILAL (1905). I. L. R. 29 Bom. 368

CERTIFICATE.

——— *Public Demands Recovery Act (Bengal Act I of 1895), ss. 7, 10, 16, 19, 31—Signature as Collector—Notice, service of, by registered post—Certificate of execution—Proclamation of sale—Signature as Judge—Irregularity in publication—Suit to set aside sale—Civil Procedure Code (Act XIV of 1882), s. 244—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 12 (b).*—A certificate under s. 7 of the Public Demands Recovery Act drawn up on an old form where the word "Collector" occurred, but which was signed by a person, who obviously was the Certificate Officer and who had in another part of the document signed himself as such, is not invalid. Under the proviso to s. 31 of the Public Demands Recovery Act, service of notice required by s. 10 can, in the first instance, be made by registered post addressed to the judgment-debtor's last known residence, though no other mode of service has been previously resorted to. A sale proclamation, when issued by the properly qualified officer, is equally effectual whether he signs himself as "Certificate Officer" or as "Judge." Where there is credible evidence of the service of the sale proclamation, and there has been a considerable lapse of time, it is to be presumed that all the necessary formalities were complied with. S. 19 of the Public Demands Recovery Act, as amended by Bengal Act I of 1897, renders s. 244 of the Civil Procedure Code applicable in its entirety to proceedings in execution of a certificate, and a separate suit to set aside a sale held in the enforcement of such certificate is not maintainable. *Janki Dass* v. *Ram Golam Sahu, I. L. R. 28 Calc. 813*, referred to. The present suit, if regarded as one to set aside a certificate under s. 7 of the Public Demands Recovery Act, is barred by s. 16; and if as one to set aside the sale, is barred by Art. 12 (*b*) of Sch. II of the Limitation Act. BARHAMDEO NARAYAN SING *v.* BIDI RASUL BANDI (1905) . . . . I. L. R. 32 Calc. 691

CERTIFICATE OF SALE.

See PUBLIC DEMANDS RECOVERY ACT.
9 C. W. N. 805

CESS.

See U. P. LAND REVENUE ACT (III OF 1901) . . I. L. R. 27 All. 183

CESTUI QUE TRUST.

See TRUSTEE.

CHAMPERTY.

See RIGHT OF SUIT . 9 C. W. N. 977

CHAMPERTY AND MAINTENANCE.

See VENDOR AND PURCHASER.
I. L. R. 27 All. 271

CHARGE.

See CRIMINAL BREACH OF TRUST.
I. L. R. 32 Calc. 1085

See CRIMINAL PROCEDURE CODE, SS. 233, 235 . . . 9 C. W. N. 1027

See MORTGAGE . 9 C. W. N. 1001
I. L. R. 32 Calc. 729

See TRANSFER OF PROPERTY ACT, S. 5.
9 C. W. N. 697

See TRANSFER OF PROPERTY ACT, S. 100
9 C. W. N. 865

CHARGE—*concluded*

——— *Rioting—Omission to set out the common object of an unlawful assembly—Prejudice to the accused—Criminal Procedure Code (Act V of 1898), s 221, sub-s 2, and s 225*—In all cases in which there is a charge *under* s. 147 of the Penal Code, the common object ought to be stated. But the omission to set out the common object does not necessarily make the conviction bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice In a case under s. 147 of the Penal Code in which the facts were very simple and there were distinct findings by the lower Court as to the part which each of the accused took in the rioting: *Held*, the accused were not prejudiced by the omission to set out in the charge the common object of the assembly BUDHU v LACHMINIA (1905)

9 C W N 599

——— *Addition to or alteration of—Indictment, subject matter of—Cheating—Property—Money—Criminal Procedure Code (Act V of 1898), ss 226, 227—Penal Code (Act XLV of 1860), s 420*—The Sessions Court is not a Court of original jurisdiction, and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to matter not covered by the indictment. The accused was put upon his trial before the Sessions Court on charges under ss 471 and 411 of the Penal Code. Upon motion to the High Court it was held that a previous acquittal covered the charge under s. 471, and that the accused could be tried only under s 411. When the case came to trial the Sessions Judge amended the charge to one under s 411—*Held*, that the Judge had full power under the law to amend the charge, and that the High Court did not intend to fetter his discretion. The word "property" in s. 420 of the Penal Code includes money BIRENDRA LAL BHADURI v EMPEROR (1905)

I. L. R. 32 Calc. 22

CHARITABLE TRUST

See TRUST

CHARTER ACT (24 & 25 Vict., c. 104)

See CRIMINAL PROCEDURE CODE

CHARTER PARTY.

See CONTRACT

CHAUKIDARI ACT (BENGAL ACT VI OF 1870).

——— *ss. 48, 49, 50, 51, 58, 61, 70—Chaukidari Chakran land settlement of—Collector's order, validity of—Evidence—Civil Cases—Presumption—Evidence Act (I of 1872), s 114 (e)—Limitation Act (XV of 1877), Sch II, Art 14—Suit to set aside an act or order—Ultra vires*—Plaintiff sued for possession of certain lands on the ground that they had been transferred to him by the Collector under ss 49 and 50 of the Chaukidari Act. There was nothing to show that any commission was appointed under s. 58 or that any report was submitted under s. 61 of the Act It was found that the lands were not *chaukidari chakran* and were not part of the plaintiff's estate *Held* (PARGITER, J, dissenting), that the defendant was entitled to question the Collector's right to make the transfer; there is no presumption, merely because of the Collector's action under ss 48 to 50 of the Act, that there was a prior valid resumption, that the Government acted under s. 58 or that a report was submitted under s 61 on all the points indicated in it. *Per* WOODROFFE, J—The meaning of s 114 (e) of the Evidence Act is that, if an official act is proved to have been *done*, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case. An order of the Collector under s. 50 of the Chaukidari Act transferring the land to a person other than the person within whose estate it lies is *ultra vires* and a nullity It is not necessary to sue to set aside an order which is an absolute nullity and Art. 14 of Sch. II of the Limitation Act does not apply *Bejoy Chand Mahatab Bahadur v Kristo Mohini Dasi, I L R 21 Calc 626*, followed *Suryanarana Devappa Hegde v Secretary of State for India, I L R 24 Bom 430; Shivaji Ketji Chavan v The Collector of Ratnagiri, I L R 11 Bom. 429; Daya v Salu, I L R 15 Bom. 424; Faki Gulam Mohidin v Sajnak, I L. R. 19 Bom 244*, referred to. NARENDRA LAL KHAN v JOGI HARI (1905).

I. L. R. 32 Calc. 107

CHAUKIDARI CHAKRAN LAND

——— *Resumption—Transfer to zamindar—Right acquired in land—Settlement by a person not having any right—Bengal Tenancy Act (VIII of 1885) s 181, if applies*—Where *chaukidari chakran* lands which had been resumed, were settled upon tenants by a person, who had no right to deal with the lands, and the tenants, with whom the settlement had been made set up a title as against the real owner on the ground that they had acquired *bona fide* a right from one whom they *bona fide* believed to have a right to let them into possession and were consequently occupancy or *non* occupancy raiyats. *Held* that the tenants did not acquire any right and the case of *Binod Lal Pakrashi v Kala Pramanik, I L. R. 20 Calc 798*, did not apply HARRINGTON and BONNERJI, JJ.—*Chaukidari chakran* lands, when resumed and transferred to the zamindar, become his *nerait* lands. MOOKERJEE, J—Upon such transfer, the lands are at the zamindar's disposal to be dealt with by him as *mal* or *nerait* at his option. Applicability of s 181 of the Bengal Tenancy Act to such lands considered JONAB ALI v RAKHUDDIN MALLIK (1905)

9 C W. N. 571

CHEATING.

See PENAL CODE, ss. 415, 417, 419, 420, 511 . . 9 C. W. N. 807, 1006
I. L. R. 27 All. 302, 561

——— *Cheating by personation—Penal Code (Act XLV of 1860), ss. 415, 419—Personation—Minors.*—On an application by the *kurta* of a joint Hindu family, in his representative character, to withdraw certain surplus sale-proceeds standing to their credit in the Treasury, the Collector directed him either to file a power of attorney or to cause all the other members to appear and admit his authority to sign on their behalf. They all appeared in person before the sheristadar, except two minors, who were personated by other persons, and signed receipts for the money and caused the personators to sign in the names of the minors. Thereupon the Collector, after inspecting the signatures, issued a bill in their favour for the amount due, which they withdrew. *Held*, that upon the facts the offence of cheating was not made out. *Reg.* v. *Longhurst*, unreported. *In re Loothy Bewa, 11 W. R. Cr. 24*, referred to. BABURAM RAI *v.* EMPEROR (1905).
I. L. R. 32 Calc. 775

——— *Deception—False representation—Conduct—Penal Code (Act XLV of 1860), s. 415.*—To constitute the offence of cheating under s. 415 of the Penal Code, it is not necessary that the deception should be by express words, but it may be by conduct, or implied in the nature of the transaction itself. *Queen* v. *Sheodurshun Dass, 3 All. H. C. 17*, referred to. KHODA BUX *v.* BAKEYA MUNDARI (1905) . . I. L. R. 32 Calc. 941

CHARITABLE TRUST.

See CIVIL PROCEDURE CODE.

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (BENGAL ACT I OF 1879).

——— ss. 135, 136, 137, 144.

See LIMITATION . 9 C. W. N. 956

CHUR LANDS.

See LIMITATION.

CIVIL COURTS.

See AGRA TENANCY ACT.

See BOMBAY REVENUE JURISDICTION ACT . . I. L. R. 29 Bom. 19

See FOREST ACT.
I. L. R. 29 Bom. 480

See PROVIDENT FUNDS ACT.
I. L. R. 29 Bom. 259

CIVIL PROCEDURE CODE (ACT XIV OF 1882).

See AGRA TENANCY ACT.

——— ss. 2, 244—"*Decree*" —*Appeal—Contempt of Court—Order directing refund of moneys realized in defiance of Court's order—Revision.*—Where a Court orders the refund of moneys improperly realized in defiance of subsisting orders of attachment, it can only order the refund of moneys actually collected, it is not competent to direct a refund of moneys recovered as costs of litigation. *Held*, also, that an order passed in the exercise of the inherent powers of a Court to punish for contempt is not a decree, and no appeal lies therefrom. In this case the Court dealt with what purported to be a memorandum of appeal as an application in revision under s. 622 of the Code of Civil Procedure. GODU RAM *v.* SUBAJ MAL (1905) . . . I. L. R. 27 All. 380

——— s. 11.

See MAINTENANCE, SUIT FOR.
I. L. R. 32 Calc. 479

——— s. 11—*Suit for right to property or to an office—Suit relating to religious rights and ceremonies—Suit by a worshipper to have idol located in a particular temple—Jurisdiction.*—Suits as to religious rites and ceremonies, which involve no question of the right to property or to an office, are not suits of a civil nature within the meaning of s. 11 of the Civil Procedure Code and are not within the jurisdiction of the Civil Court. *Vasudev* v. *Vamnaji, I. L. R. 15 Bom. 80*, approved. A suit by a worshipper of an idol, not based on any right to the property in the idol or to an office against its custodians to locate it in a particular temple instead of in another, there being no allegation that the plaintiff is prevented from worshipping the idol at the latter temple, is not cognizable by a Civil Court. *Jagannath Churn* v. *Akali Dassia, I. L. R. 21 Calc. 463*, distinguished. *O. Nagiah Bathudu* v. *Muthacharry, 11 M. L. J. 215*, referred to. LOKE NATH MISRA *v.* DASARATHI TEWARI (1905).
I. L. R. 32 Calc. 102

——— s. 11—*Suits of a civil nature—Right to property or to an office—Jurisdiction of Civil Courts—Suits for declaration of right to recite texts—Maintainability.*—A suit is not cognizable in a Civil Court, where the subject of the plaintiffs' claim is confined to rights in religious ceremonies without a claim to any office or any emolument. A right to recite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a Civil Court has nothing to do. SUBBARAYA MUDALIAR *v.* VEDENTACHARIAR (1905).
I. L. R. 28 Mad. 23

——— s. 13.

See BENGAL TENANCY ACT, s. 109.

See ESTOPPEL BY JUDGMENT.
I. L. R. 32 Calc. 357

See RENT SUIT.

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *continued*

——— s. 13—*Decision on a question of law not res judicata when the object matter of the subsequent suit is different—Hindu law—Charitable Trust, trustee of, has no power to appoint a co-trustee in place of a deceased trustee.*—The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of provision in the instrument creating such trust or of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him. A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties, when the object matter of the two suits are different. *Quære*—Whether such a decision can be *res jud cata* against a party, who could not have prosecuted an appeal against it *Parthasaradi* v *Chinna Krishna I L R 5 Mad 304, Venku* v *Mahalinga, I L R 11 Mad 393, Chamanlal* v *Bapubhai, I L R 22 Bom 669; Vishnu* v *Ramling, I L R 26 Bom 25, 30,* referred to and followed GOPU KOLANDAVELU CHETTY v SAMI ROYAR (1903)
I. L. R. 26 Mad. 517

——— s 13—*Res judicata—Erroneous decision in a former suit—Bengal Tenancy Act (VIII of 1885), ss 67, 179—Interest*—Where in a previous suit for rent the Court erroneously held that interest exceeding 12 per cent. per annum was not recoverable from a permanent tenure-holder in a permanently settled area although the *kabuliat* stipulated for the payment of such interest *Held*, that in a subsequent suit for rent the erroneous decision in the former suit would not operate as *res judicata*. ALIMUNNISSA CHOWDHRANI v SHYAMA CHARAN RAY (1905) 9 C W N 488

——— s. 13—*Res judicata—Erroneous decision in a former suit—Bengal Tenancy Act (VIII of 1885), ss 67 74 179—Mokurari lease—Abwab—Illegal cesses—Stipulation to pay*—Where the plaintiff in a suit for recovery of rent claimed certain cesses, which the defendant had stipulated to pay in his *kabuliat* and which the defendant said he was not liable to pay inasmuch as in a previous suit for recovery of rent of a previous period it had been held that the same was not recoverable according to law: *Held* that the present claim was barred by the rule of *res judicata* PADMANAND SINGH v RADHA SINGH (1905) 9 C W. N 469

——— s 13—*Res judicata—Matters in issue*—A plea of *res judicata* taken on the ground that the questions in issue in the suit were formerly in issue in probate proceedings cannot be given effect to when the said proceedings are not in evidence and there is thus no sufficient evidence to support the plea A judgment passed in the previous proceedings showing what the Judge understood to have been the questions for decision in those proceedings is not enough to support such a plea. The Court cannot give effect to the plea, unless it can say for itself that the matters in issue in the suit were in issue in the previous proceedings, MIRZA

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

KHERATULLIN BAHADUR v NAWAB NUSRAT UD-DOWLA ABBAS HOSSEIN KHAN (1905).
9 C W. N. 938
s.c L. R 32 I. A. 244

——— s 13—*Auction purchaser—Previous sale*—An auction purchaser at a revenue sale cannot be considered to be the successor in interest of the defaulting proprietor so as to be bound by a judgment passed in a suit previous to the sale, to which the defaulting proprietor was a party *Kanta Prashad Hajari* v *Secretary of State for India in Council, 8 C. W. N 676, Moonshi Buzlool Rahman* v *Frandhona Dutt, 8 W R 222; Radhagobind Kaer* v *Rakhaldas Mukherji, I L R 12 Calc 62,* referred to But a decree which was obtained on consent against a defaulting proprietor for possession of a plot of land is admissible in a suit where the purchaser is a party, to shew how possession was obtained, although that arrangement may not be binding upon the purchaser *Peary Mohun Mukherji* v *Drobomoyi Debia I L R 11 Calc* 745 relied upon GOKUL CHANDRA DAS v HARASUNDARI DASI (1905) 9 C. W N. 383

——— s. 13—*Res judicata—Question directly and substantially in issue—Omission to raise ground of defence in former suit*—*H*, an Oudh taluk lar, executed a deed of gift in 1859 by which he purported to give to *R* (the only son of his elder son who was dead) the whole taluk with the exception of a few villages In 1871 a suit brought by *H* against *R* to have it declared that notwithstanding the deed of gift the proprietary right in the taluk was vested in him was settled by a compromise by the terms of which various portions of the taluk were to be held for life by *H*, *R* and *D* the mother of *R* and on the expiration of those three lives, *L* (the younger son of *H*) and his heirs were to succeed to the whole of the estate This compromise was embodied in a decree of Court In 1876 *H* and *L* brought a suit against *R* and his wife to cancel a deed conveying a portion of the taluk to the latter as being in excess of the powers of alienation given to *R* by the compromise of 1871 The defendants in that suit did not contest the validity of the compromise, but upheld the alienation as valid, and asserted that *L* had no such interest in the property as entitled him to sue, and issues were raised on those points The Court held that *L* was "a certain remainder man under the terms of the agreement," that he "or his representatives will certainly inherit the estate some time or other," and that he was entitled to sue; that the alienation was void as against *H* as being in excess of the power reserved by the compromise to *R* who was held only entitled to alienate for his life, but that no right had yet accrued to *H* and *L* to disturb the possession of *R* a wife In 1889 after the deaths of *H*, *D* and *L*, a portion of the taluk was attached by creditors of *R* and sold in execution of the decree without limit of title In a suit brought by the son of *L* in 1896 against *R*, his judgment creditors, and the purchaser at the sale to have it declared that the plaintiff was entitled as the immediate reversioner to an absolute estate in the

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

portion sold on the death of *R*, and that after *R*'s death the sale would be inoperative as against him, the defendant *E* set up the defence that he had by virtue of the deed of gift of 1859 an absolute title, which was not displaced by the effect of the compromise and the decree embodying it. *Held*, by the Judicial Committee (confirming the decision of the Judicial Commissioners of Oudh) that the decision in the suit of 1876, as having established between *R* and *L* (the father and predecessor in title of the plaintiff) that *R* had only a life interest in the taluk, and that *L* (and therefore also the plaintiff as his heir) had a vested interest in remainder, was *res judicata* in the present suit. RAMPAL SINGH *v.* RAM PRASAD SINGH (1905) . I. L. R. 27 All. 37 L. R. 32 I. A. 17

——— s. 13—*Res judicata—Pro formâ defendant.*—The plaintiff sued Nathu Mal and Mathri to recover possession of certain mortgaged property alleging that the mortgage had been discharged by payment of half the amount due to the persons, whom he made defendants and half to Malhi Kunwar and others as representatives of one Mitter Sen. The defendants, 1st party, pleaded that they were entitled to the whole of the mortgage money, and that payment of one-half to the representatives of Mitter Sen was no payment as against them. Malhi Kunwar and others were made defendants to the suit, and in the end it was held that the defendants, 1st party, were entitled to the whole of the mortgage money, and a decree was passed in favour of the plaintiff on payment of R997 to Nathu Mal and Mathri. The Court in that suit exempted the defendants Malhi Kunwar and others, holding that they had no interest in the property in suit. Subsequently the plaintiff sued Malhi Kunwar and others to recover from them the money paid on account of the mortgage. *Held*, that the decision in the former suit did not render the question of payment to the present defendants *res judicata*. *Brojo Behari Mitter* v. *Kedar Nath Majumdar*, *I. L. R. 12 Calc. 550*, approved. MALHI KUNWAR *v.* IMAM-UD-DIN (1905) . I. L. R. 27 All. 59

——— s. 13—*Res judicata—Execution of decree—Application dismissed for want of jurisdiction—No appeal from order of dismissal—Subsequent application barred.*—A Munsif, as a Court executing a decree, dismissed an application for execution, holding that owing to certain proceedings in insolvency, which had taken place at the instance of the judgment-debtor in the Court of the District Judge, he (the Munsif) had no jurisdiction to entertain it. No appeal was preferred against the order of the Munsif dismissing this application for execution, and the Munsif's order became final. *Held*, that a further application by the same decree-holder in the same Court to execute the same decree against the same judgment-debtor was barred by s. 13 of the Code of Civil Procedure. NABI MUHAMMAD *v.* JWALA PRASAD (1905) . . I. L. R. 27 All. 148

——— s. 13—*Res judicata—Estoppel—Suit in Civil Court for ejectment of defendant as a trespasser—Effect of previous litigation in Revenue-Courts.*—Plaintiffs applied to a Rent Court to eject defendant, alleging that he was their tenant, but their application was ultimately rejected on the finding that defendant was either the owner or a rent-free tenant of many years' standing. Again plaintiffs applied for enhancement of rent in respect of the same land from which they had previously sought to eject plaintiff, but were again defeated on the finding that the defendant was in adverse possession. Subsequently plaintiffs sued in the Civil Court to eject defendant as a trespasser. *Held*, that the plaintiffs were not debarred from having recourse to the Civil Court. *Baldeo Singh* v. *Imdad Ali*, *I. L. R. 15 All. 189*, distinguished. MAHESH PRASAD *v.* RANJOR SINGH (1905).

I. L. R. 27 All. 163

——— s. 13, Expl. II—*Res judicata—Matter which might and ought to have been made a ground of attack in a former suit.*—The plaintiffs sued for their share by right of inheritance in the assets of a deceased Mahomedan, the defendant being the widow of the propositus. In that suit the widow pleaded that she was in possession of the property claimed in virtue of a deed of gift from her late husband, and also that she had a lien on it for unpaid dower. The latter defence was accepted by the Court, and the plaintiffs' suit dismissed. The plaintiffs then brought a second suit against the widow, in which they offered to redeem the dower-debt, and claimed possession after such redemption. *Held*, that this second suit was not barred by s. 13, expl. II, of the Code of Civil Procedure. ZINAT UN-NISSA *v.* RAJAN (1905) I. L. R. 27 All. 142

——— s. 13, Expl. III.

See MESNE PROFITS.

I. L. R. 32 Calc. 118

——— ss. 13, 43—*Former suit to redeem kanam, no bar to subsequent suit based on the kanam and title, so far as the latter is based on title.*—A previous suit to redeem four out of six items of land mortgaged under a kanam deed on the ground that the kanam was split up by a subsequent demise, and which suit was dismissed on the ground that such demise was not valid, will be a bar to a subsequent suit to redeem under the same kanam, so far as such suit is based on the kanam. S. 13 of the Code of Civil Procedure will be a direct bar to any claim on the demise and ss. 13 and 43 of the Code of Civil Procedure will bar a claim on the original kanam, as an alternative claim on it might have been made in the prior suit. But where in the subsequent suit the plaintiff relies as well on his title, such title is a distinct cause of action, and neither s. 13 nor s. 43 of the Code of Civil Procedure will bar his claim on such title. A claim on a kanam is a claim arising *ex contractu*, while a claim on title against a trespasser is founded on tort. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, *I. L. R. 26 Mad. 760*, followed. *Rangasami Pillai* v. *Krishna Pillai*, *I. L. R. 22 Mad. 269*, dissented from. *Per* BODDAM, *J.*—Estoppel by judgment cannot be avoided by suing on a new form of claim or on a

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

ground of relief which might have been, but was not raised in the former suit, if such claim or ground arises out of and depends on the same right or title as that which was directly in question in the former suit. *Chinniya Mudali* v *Venkatachella Pillai*, 3 M H C R 320; *Muthumadeva Naik* v *Sevattamuthumadeva Naik*, 7 M H C 160, referred to and approved. PARAMBATH MANAKKAL v PUTHENGHATIL MUSAMUT (1905)

I. L. R. 28 Mad. 406

——— ss. 13, 244—*Indian Succession Act (X of 1865), s 232—Administrator, decree against—Execution sale—Suit by subsequent administratrix to set aside decree and sale—Fraud or collusion—Rateable distribution—Res judicata—Procedure in creditor's suit against estate of deceased—Court Fees Act (VII of 1870) s 7—Appeal.*—A decree on an award having been passed against an administrator at the instance of a creditor of the estate represented by the administrator, certain property referred to in the award was purchased by the decree-holder in execution proceedings with the sanction of the Court. Afterwards an administratrix, appointed in the place of the administrator, having brought a suit to set aside the decree and the subsequent sale in execution on the ground that under s. 232 of the Succession Act (X of 1865) the decree-holder was entitled only to a rateable distribution among the creditors of the estate *Held*, that in the absence of fraud or collusion the decree and the subsequent sale in execution could not be set aside. *Held*, further, that according to ss 244 and 13 of the Civil Procedure Code (Act XIV of 1882) the decree having been executed, the execution bound the parties and all persons claiming through them, and that the question was, therefore, *res judicata*. *Per* CHANDAVARKAR, J.—"The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative in whom all the property of the deceased vests *as such by virtue of s 179 of the Succession Act*, may be said to be similar to that of the sebait of an idol" *Prosunno* v *Golab* 2 I A 145 referred to and applied. A creditor's action against the estate of a deceased person should be treated as an administration suit. A preliminary objection was taken that no appeal lay to the High Court on the ground that the suit had been valued at R640 and was one for a declaration, the prayer for possession being merely consequential. *Held*, overruling the objection that the suit fell within the scope of s 7, cl v of the Court Fees Act (VII of 1870), and that the real value of the property being more than R5,000, an appeal lay to the High Court. BAI MANEKBAI v MAGANCHAND (1905)

I. L. R. 29 Bom. 66

——— ss. 13, 373—*Adducing of partial evidence in case—Subsequent default by plaintiff—Dismissal of suit—Subsequent suit by defendant—Issues in former suit, if res judicata—Limitation Act (XV of 1877), Sch II, Arts 49 and 116—Recovery of property under registered deed of release*—Where a plaintiff appears in a suit and goes into evidence, but before the evidence is closed makes default and the case is dismissed, matters directly and substantially in issue in the suit are *res judicata* in a subsequent suit between the same parties. *Jagatjit Sinha* v *Sarabjit*, I L R 19 Calc 159; *Kali Krishna Tagore* v *Secretary of State*, L R 15 I A 186; s.c., I L R 16 Calc 173, *Sri Raja, etc.*, v *Kantayamma*, *Sir Raja, etc.*, v *Gopa Rao* 2 C W N 837; s.c. L R 25 I A 102, distinguished *Rungrao Raiji* v *Sidhi Mahomed, etc.*, I L R 6 Bom. 492; *Muhammad Salim* v *Nabian Bibi*, I L R 8 All 293; *Mofizoodeen* v *Shaikh Amoodeen*, 23 W R 59; *Robert Watson & Co* v *Collector of Rajshahye*, 13 M I A 160; and *Kartick Chandra Pal* v *Sridhar Mandal*, I L R. 12 Calc 563, referred to. *A* instituted a suit against *B* to set aside a registered deed of release executed by him in *B's* favour in 1896, alleging same to have been a *benami* transaction and to have it declared that properties mentioned in the deed belonged to him. On the case being called on *A's* evidence was partially gone into. On the next day of hearing *A* made default and his counsel stated that he had no instructions. On that, the Court dismissed the case without delivering judgment. Subsequently *B* instituted this suit in 1900 to recover certain properties, covered by the deed, which he alleged remained in *A's* possession and which *A* had failed to make over to him. *A* raised the defence that the property belonged to him and that the deed, being *benami*, was inoperative. *Held*, that *A* was precluded from raising the above defence, as those issues were *res judicata*. *Held further*—on the construction *of the Deed of Release*—that the suit was not barred as Art 116, and not Art. 49, Sch II of the Limitation Act applied. ROMA NATH DASS v MOHESH CHUNDER PAL (1905)

9 C W. N. 679

——— s 16, cl. (d)—*Suit for determination of any right to or interest in immoveable property—Suit for the recovery of purchase money under contract for the sale of land—Jurisdiction*—A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any right to or interest in immoveable property" within the meaning of s 16, cl (*d*) of the Code of Civil Procedure *John Young* v *Mangalapally Ramaiya*, 3 M H C 125 and *His Highness Srimant Maharaj Yashvant Roy Holkar* v *Dadabhai Cursetji Ashburner*, I L R 14 Bom 353, referred to and distinguished. MATURI SUBBAYYA v KOTA KRISHNAYYA (1905) I. L. R. 28 Mad. 227

——— ss. 17, 20, 57, 622

See PRACTICE I. L. R. 32 Calc 146

——— s. 17, Expls II and III—*Jurisdiction—Place where contract was made—Promissory note, dated and signed within the jurisdiction of one Court, and sealed and countersigned elsewhere.*—A negotiable promissory note, drawn on behalf of a Company, was signed by the Secretaries and Treasurers and dated at Bellary The-

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

note was then sent to another place, where the Agent countersigned and affixed the seal to it and posted it, addressed to the payee at Madras, who received it there. A suit was subsequently brought on the note in the Court at Bellary :—*Held*, that the Court had jurisdiction. A statement of the place of execution is not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating it at a place different from that at which it is actually made, if, for any purpose of theirs, they consider it necessary to do so. Where, therefore, a negotiable note is dated with reference to a specified place, and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract. *Winter* v. *Round*, *1 M. H. C. 202*, referred to. MEENAKSHI GINNING AND PRESSING COMPANY LD. v. MYLE SREERAMULU NAIDU (1905). . . . . I. L. R. 28 Mad. 19

——— s. 17, Expl. III, cl. (2).

See CONTRACT . I. L. R. 32 Calc. 884

——— s. 17, Expl. III, cl. (2)—*Jurisdiction—Suits arising out of contract—Cause of action—Place, where the offer is accepted—Contract Act (IX of 1872), ss. 8, 10 and 25.*—*A* owed *B* a sum of money for which *A* gave *B* at Midnapore a cheque drawn on a firm in Calcutta, in favour of *C*. *B* took the cheque to *C* at Purulia and received the amount. *C* presented the cheque at Calcutta, where it was dishonoured. On a suit brought by the representatives of *C* at Purulia against *A* for the recovery of the amount paid, the defence was that the Purulia Court had no jurisdiction to entertain the suit. *Held*, that the contract, on which the suit was brought, was completed as soon as the consideration was paid, and as this was done at Purulia, the contract was made at that place within the meaning of s. 17, expl. iii, cl. (2) of the Civil Procedure Code, and therefore the Purulia Court had jurisdiction. SITARAM MARWARI v. THOMPSON (1905) I. L. R. 32 Calc. 884

——— ss. 20, 111—*Set-off—Different transaction—Power of High Court to restrain suit in Presidency Small Cause Court—Amount claimed in Small Cause Court suit admitted in High Court suit.*—*A* filed this suit against *B* to recover R3,421-15-3 alleged to be due on account stated on account of business dealings. He admitted a debt of R621-14-3 due by him to *B* on a different account. *B*, on the same day as *A*'s suit was filed, instituted a suit in the Presidency Small Cause Court to recover the said R621-14-3. *Held*, *B* should treat the sum of R621-14-3 as an admitted set-off and, if plaintiff failed in his suit, *B* would have a right to ask for judgment for that sum. *Held further*, that this Court had jurisdiction to restrain the Presidency Small Cause Court from proceeding with *B*'s suit. R. S. HART v. A. W. GROSSER (1905) . . . 9 C. W. N. 748

——— ss. 20, 111—*Set-off—Same transaction—Mortgage-decree—Purchase of decree, free from incumbrance—Right of purchaser to compel vendor to pay off attaching creditor—Transfer of Property Act (IV of 1882), s. 55, sub-s. 1, cl. (g), sub-s. 5, cl. (b), principles of, application of—Payment by purchaser to protect his interest—Payment for vendor's benefit—Right to refund—Suit on deposit receipt—Admissibility of evidence to prove object of deposit—Evidence Act (I of 1872), s. 92.*—Defendant executed an *amanati* receipt in favour of the two plaintiffs, the contents of which were as follows: "That you keep in deposit with me R7,774-5-10 in order to pay off debts due to your Calcutta creditors on account of your joint business as well as to meet the expenses of your joint law suit. I shall return the said deposit money to you when you both will . . . jointly demand payment from me of the said money in deposit. . . . ." (The rest of it provides for the payment of interest at a certain rate from the date of demand). The amount mentioned in the receipt represented the unpaid balance of the purchase-money of a mortgage-decree sold by the plaintiffs to the defendant, on the same day, free of incumbrance. The decree, however, had been already attached by some creditors of the plaintiffs. In a suit brought by the plaintiffs on the basis of the *amanati* receipt, to recover the amount of deposit with interest, the defendant claimed to set off a sum of R6,289-12-5 paid by him to release the decree from attachment, the payment having been made at a time when a second mortgagee of the property covered by the decree applied for execution of a decree obtained on his mortgage by sale of the property. In support of his claim the defendant adduced evidence to prove (1) that the deposit was made as a security for the release of the decree from attachment, and (2) further, that there was an oral agreement between the parties that on plaintiffs failing to pay off the attaching creditors, the defendant would be at liberty to make the payment out of the deposit. *Held* that, as it was established that the receipt embodied the real contract between the parties with regard to the deposit, the evidence offered to prove a separate agreement empowering defendant to pay off the attaching creditors, was not admissible. But s. 92 of the Evidence Act would not bar evidence to prove the object for which the deposit was made or to explain the meaning of the first sentence in the receipt, and this evidence proved that the defendant was to pay the money to the plaintiffs when called on and that the plaintiffs were then to pay off the claim with the money. *Held*, nevertheless that the defendant was entitled to the set-off claimed—(1) because, having the right to compel the plaintiffs to pay off the claim of the attaching creditors, defendant had been forced to pay it off himself in order to save his own interests under the purchased decree from the second mortgagee, *James Hills* v. *Woomamoyee Burmonee*, *15 W. R. 545*, referred to. (2) because, the payment was made on the plaintiffs' behalf and they had the benefit of it, (3) and because, the claim for repayment of the deposit and the payment made to release the decree were so connected together as to form parts of the same transaction. KHETSIDAS AGARWALA v. SHIB NARAYAN MURDA (1905) . . . . . 9 C. W. N. 178

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

——— s. 25

See BENGAL, AGRA AND ASSAM CIVIL COURTS ACT, s 21

——— ss 28, 53—*Amendment of plaint—Amendment may be allowed when such amendment does not raise a case essentially different from that first set up—Misjoinder of parties and causes of action*—Where in a suit brought by four members of a Hindu family against the widow of a fifth to recover the property of the deceased by right of survivorship, the plaint contained the further allegation that one of the plaintiffs was the adopted son of the deceased, and the defendant pleaded division and also denied the adoption it is open to the Court on finding the adoption proved, to pass a decree in favour of the adopted son alone, even in the absence of a prayer in favour of such adopted son, without trying the question of division between the plaintiffs and the husband of the defendant. Such a course in no way contravenes the provisions of s. 53 (c) of the Code of Civil Procedure, as the object of the proviso to that section is only to prohibit amendments, which involve the trial of issues substantially different from those raised by the original pleadings Where the finding on one of the issues negatives any right in the defendant to hold the properties on the case set up by such defendant, it is not open to such defendant to insist on the trial of other issues, which can only affect the rights of the plaintiffs *inter se* and probably other rights of the defendant and plaintiffs not in issue in the suit *Semble* A plaint will not be bad as contravening s. 26 of the Code of Civil Procedure, because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved *Subrahmanyam v Venkamma I L R 26 Mad 627*, referred to LAKSHMAKKA v NAGI REDDI (1905) . I L. R. 28 Mad 500

———s. 26, Expl. v—*Res judicata—'Right to relief' under s 26 in previous suit essential to bar under explanation V of s 13*—Where some co-sharers sued to recover the whole property joining as a defendant a sharer who refused to join as plaintiff and who remained *ex parte* and a decree was passed in favour of the plaintiffs awarding to them their shares alone such suit must be considered to have been brought by the plaintiffs for their shares alone and the defendant sharer or his representative cannot as a plaintiff in a subsequent suit against a co-defendant in the prior suit rely on the judgment as a bar under s. 13, explanation V of the Code of Civil Procedure on the ground that the plaintiffs in the previous suit claimed a relief common to them and the defendant co-sharer *Chandu v Kunhamed, I L R 14 Mad 224* overruled. *Lutchanna v Sarasayya, I L R 18 Mad 164* not followed. A right to relief can be said to be claimed in common' under expl V to s 13 of the Code of Civil Procedure, only as between parties, who would be benefited by such relief, if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under s 26 of the Code of Civil Procedure A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought. *Gopalayyan v Raghupati Ayyan* alias *Aiyavayyan, 3 M H C 217, Nobin Chandra Mazumdar v Muktasundari Debi, L R 7 I A. 38; Surender Nath Pal Chowdhry v Brojo Nath Pal Chowdhury, I L R 13 Calc 352*, referred to and followed. *Madharan v Kesharan I L R 11 Mad 191*, distinguished. SOMASUNDARA MUDALI v KULANDAIVELU PILLAI (1905) . I. L. R. 28 Mad. 457

——— s 32.

See PARTIES, ADDITION OF
I L. R. 32 Calc 463, 582

——— s. 32.

See TRANSFER OF PROPERTY ACT, s 85

——— s. 34.

See LIMITATION ACT

——— ss. 43, 111.

See SUIT, MAINTAINABILITY OF,
I L. R 32 Calc. 654

——— s 54—*Rejection of plaint—Costs of appeal when the appellant did not present his case in the proper light to the Court of first instance.*—If a plaint be presented upon insufficient stamp and the deficit Court-fee be not put in within the time allowed by the Court the Court ought to reject the plaint But if on the date on which the deficit Court fee is ultimately put in, the suit of the plaintiff be not barred by limitation the plaint may be regarded as if it was presented for the first time on that date and the suit ought to be proceeded with. *Brahmoyi Dasi v Ambi Si I L R 27 Calc 376*, referred to As the plaintiff (appellant) did not present the matter to the Munsif in the proper light, it was ordered that he should pay the costs of the respondent in the High Court, although the appeal was decided in his favour HARA KUMAR PAL CHOWDHURY v SHAIKH SAFATULLAH (1905)
9 C W. N. 844

——— ss. 82, 174.

See COURT FEES ACT, s 29

See PENAL CODE, ss 225B AND 353.

——— ss. 108, 234, 368—*Death of defendant after ex parte decree—application by representatives of the defendant to be brought on record*—S 368 of the Code of Civil Procedure only applies to the case of a defendant, who dies before a decree is passed Where, therefore, a defendant dies after a decree *ex parte* has been passed against him, his representatives cannot apply to set aside the *ex parte* decree, unless the plaintiff had brought them on the

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

record as representatives under s. 234 of the Code of Civil Procedure. S. 108 of the Code of Civil Procedure applies only to the defendant against whom the *ex parte* decree is passed. SAMBASIVA CHETTI *v.* VEERA PERUMAL MUDALI (1905), I. L. R. 28 Mad. 36

——— ss. 111 and 216—*Set-off—Cross-claim in the nature of set-off.*—Plaintiffs as brokers for the sale of indigo seed sued defendants to recover the amount alleged to be due to them by the defendants as commission on account of certain sales of indigo seed made by them on behalf of the defendants. *Held*, that the Court might properly take into consideration by way of an equitable set-off the loss occasioned by the plaintiffs to the defendants through the plaintiffs' negligence in not carrying out the defendants' instruction respecting the selling of the seed. *Niaz Gul Khan* v. *Durga Prasad, I. L. R. 15 All. 9*, followed. NAND RAM *v.* RAM PRASAD (1905) . . . . I. L. R. 27 All. 145

——— s. 189—*Recording the substance of evidence.*—Where a Judge of a Small Cause Court in recording the evidence did not give the substance of the evidence of each witness, but merely a short abstract of the whole evidence. *Held* that, this was not a compliance with the provisions of s. 189 of the Civil Procedure Code. AMRITA SHAHA *v.* PANCHKORI SHAHA (1905) . . 9 C. W. N. 418

——— s. 189—*Recording the substance of evidence.*—Case in which it was held, setting aside the judgment and decree of a Small Cause Court Judge and directing a new trial, that the evidence was not recorded in accordance with s. 189 of the Civil Procedure Code *Amrita Shaha* v. *Panchkori Shaha, 9 C. W. N. 418*, followed. CHETHRU GOPE *v.* SRI CHARAN BHAGAT (1905) . 9 C. W. N. 420

——— ss. 204, 562, 574—*Dismissal of a suit on some one of the issues—Jurisdiction of Court to determine other issues.*—In a suit for ejectment the main issues in the case related to the validity of the plaintiff's lease and the character of the defendants' holding. The first Court held that the plaintiff's lease was not valid, but instead of dismissing the suit on that one point entered into the merits and found on the evidence that the defendants had a permanent right and could not be ejected on a notice to quit. The lower Appellate Court affirmed the first Court's judgment on all the points. The High Court reversing the finding on the first point held that the plaintiff's lease was valid. *Per* RAMPINI, *J.*—That the case should be remanded for the determination of the nature of defendants' tenancy, inasmuch as the lower Courts had no jurisdiction to determine such issues after having held on the first issue that the suit was not maintainable: *Held* by MACLEAN, *C.J.*, agreeing with MITRA, *J.*—That the lower Courts had jurisdiction and very properly exercised that jurisdiction in deciding all the issues, and it was not necessary to remand the case, there being the finding of fact that the defendant's rights were permanent. ISMAIL KHAN MAHOMED *v.* HARI CHARAN PAL (1905) . . . 9 C. W. N. 60

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 206—*Decree affirmed on appeal—Amendment by Original Court—Effect—Appeal—Jurisdiction—Revision.*—When a decree, after being affirmed on appeal, is amended by the Original Court under s. 206 of the Civil Procedure Code, and no step is taken to set aside the amended decree, the amended decree will be binding between the parties and its validity cannot be challenged in execution proceedings on the ground that the Original Court had no jurisdiction to make the amendment. *Semble*—The amended decree is a decree between the parties within the meaning of the Code and as such is appealable. MENAT ALI *v.* AMDAR ALI (1905). 9 C. W. N. 605

——— s. 206—*Execution of decree—Limitation—Amendment of decree—Limitation Act (XV of 1877), ss. 19, 20 and 21, Sch. II, Art. 179—Part payment by one of several judgment-debtors.*—An order granting an application under s. 206 of the Code of Civil Procedure is not an order passed upon review of judgment within the meaning of art. 179 of the second schedule to the Indian Limitation Act, 1877, and has not the effect of extending the period of limitation for execution of the decree. *Daya Kishan* v. *Nanhi Begam, I. L. R. 20 All. 804; Tarsi Ram* v. *Man Singh, I. L. R. 8 All. 492*, and *Kallu Rai* v. *Fahiman, I. L. R. 13 All. 124*, followed. *Kishen Sahai* v. *The Collector of Allahabad, I. L. R. 4 All. 137*, referred to. *Kali Prosunno Basu Roy* v. *Lall Mohan Guha Roy, I. L. R. 25 Calc. 258*, dissented from. A payment made by one of several persons jointly liable under a decree, otherwise than as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the payment. AHSANUL-LAH *v.* DAKKHINI DIN (1905). I. L. R. 27 All. 575

——— s. 209—*Interest—Discretion of Court.*—S. 209 of the Civil Procedure Code leaves it to the discretion of the Court to allow or disallow interest on the amount decreed, from the date of the suit to the date of the decree. PEARY MOHUN MUKERJEE *v.* NARENDRA NATH MUKERJEE (1905) 9 C. W. N. 422 s.c. I. L. R. 32 Calc. 582

——— ss. 212, 244, 312.

See LIMITATION. I. L. R. 32 Calc. 175

——— s. 215A—*Principal and agent—Suit for an account—Form of decree.*—In a suit by a principal against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements. *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi, L. R. 13 I. A. 123*, and *Ram Das* v. *Bhagwat*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

Dut, Weekly Notes, 1905 p 1, referred to RAGHUNATH *v* GANPATH (1905)
I. L. R. 27 All 374

——— ss 230, 285—*Mortgage decree—Decree for money—Application for execution—Limitation*—Where a decree directs a defendant to pay money to the plaintiff and in default the property mortgaged is to be sold and the balance if any, is to be realised from the other properties of the defendants:—*Held*, that this was a 'decree for money' within the meaning of s 230 of the Code of Civil Procedure *Kammachi Kutter v Pakker, I L R 20 Mad 107*, followed *Kartick Nath Pandey v Juggernath Ram Marwari, I L R 27 Calc 255*, differed from An application for attachment of certain property cannot be treated as an application to execute a decree which directs the sale of that property *Jogemaya Dassi v Thacomoni Dassi, I L R 24 Calc 472*, approved ABDULLA SAHIB *v* GOSMAN SAHIB (1905)
I L. R. 28 Mad. 224

——— ss. 232, 244—*Power of Court discretionary*—Where the right of a party applying for execution as transferee is *sub judice*, it is not obligatory on the Court under the last clause of s 244 of the Code of Civil Procedure, to stay execution, until the question has been determined by separate suit. The Court may in its discretion either stay execution or dismiss the application VANULA BHARANA *v* RANGAIAYAN CHETTY (1905)
I L. R. 28 Mad 357

——— ss. 232, 244—*Transferee decree holder—Mesne profits and costs not included in transfer—Suit to enforce right under transfer—Maintainability—Plaint treated as application in execution*,—A decree had been passed against the present defendant in a previous suit for the surrender of possession of certain lands and also for mesne profits and costs The interest of the decree holders in these lands was then sold in execution of a decree, which had been passed against them, and was purchased by the present plaintiff The present plaintiff applied for execution of the original decree and to be placed in possession of the property he had purchased The petition was rejected, and he now sued to obtain possession of the properties he had purchased On the question being raised whether the suit was barred by s 244 of the Code of Civil Procedure —*Held*, that plaintiff was entitled to relief He was not a transferee of all that had been decreed in the original suit, inasmuch as the right to mesne profits and costs had not passed to him If, for that reason, he was not entitled to be recognized as the transferee of the decree and to execute it as such, he was entitled to enforce his right by suit. Assuming however, that no separate suit lay, and that he should have proceeded by way of execution the case was one in which the plaint should be treated as an application for execution. *Sarupai Roy v Syed Alli Hossein, 24 W R, 11*, referred to. PASUPATHI AYYAR *v* KOTHANDA RAMA AYYAR (1905)
I. L. R. 28 Mad. 64

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

——— s. 233

See TRANSFER OF PROPERTY ACT, s 99

——— ss. 234, 244, 248, 578—*Application to execute decree against representative to be made to Court, which passed decree—Application to Court executing decree not an irregularity, which can be cured under s 578—Construction of statute*—On a reference as to whether an application under s 234 of the Code of Civil Procedure to bring the legal representatives of a deceased judgment-debtor on the record can be made to the Court to which the decree had been transferred for execution —*Held by the Full Bench*, that, where a decree of one Court had been transferred to another Court for execution, an application by the decree-holder under s 234 to execute the decree against the legal representatives of the deceased judgment-debtor must be made to the Court which passed the decree and not to the Court executing the same *Hiracband Harjivandas v Kasturchand Kasidas I L R 18 Bom 221*, approved *Seth Shapurji Nana Bhai v Shankar Dat Dube, I L R 17 All 431*, approved *Sham Lal Pal v Modhu Sudan Sircar, I L R 22 Calc 555*, not followed *Per* SIR ARNOLD WHITE *C.J*—The provisions of ss 234 and 244 (c) are not irreconcilable The last paragraph of s. 244 only applies when a question arises as to who is a 'representative' of a party for the purpose of that section and ought not to be construed as cutting down the power given to the Court which passed the decree by the express words of s 234 There is no difficulty in reconciling ss 234 and 248 they can be construed together and due effect given to the provisions of each The word 'representative' in s 244 has a much wider meaning than the words 'legal representative' in s 234 An order under s 234 is not made in exercise of the powers 'in executing a decree,' but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred, s 234 contemplates the making of an order The legislature in enacting s 244 (c) were not distinguishing cases, where a decree had been transferred for execution between the powers to be exercised by the Court which passed the decree and the powers to be exercised by the Court to which the decree has been transferred respectively, and effect must be given to the express provisions of s 234 A statute ought to be construed so that, if it can be prevented, no clause section or word shall be superfluous, void or insignificant *The Queen v Bishop of Oxford, L R 4 Q B D 245 Per* DAVIES, *J*—There is a direct and irreconcilable conflict between the provision in the first paragraph of s. 234 and that in cl (c), s 244, read with the last paragraph of that section. *By the Divisional Bench*.—An application under s 234 made to the Court to which the decree is transferred for execution cannot, when objection is taken by the other party to its being entertained, be treated as a mere irregularity under s. 578 of the Code of Civil Procedure SWAMINATHA AYYAR *v* VAIDYANATHA SASTRI (1905)
I. L. R. 28 Mad. 46

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 235.

See TRANSFER OF PROPERTY ACT, ss. 88 AND 89.

——— s. 244.

See CERTIFICATE. I. L. R. 32 Calc. 691

See AUCTION PURCHASER. I. L. R. 32 Calc. 332

——— s. 244—*Succession Act (X of 1865), s. 282—Execution sale—Suit by subsequent administratrix to set aside decree and sale—Fraud or collusion—Rateable distribution—Res judicata—Procedure in creditor's suit against estate of deceased.*—A decree on an award having been passed against an administrator at the instance of a creditor of the estate represented by the administrator, certain property referred to in the award was purchased by the decree-holder in execution proceedings with the sanction of the Court. Afterwards an administratrix appointed in the place of the administrator, having brought a suit to set aside the decree and the subsequent sale in execution on the ground that under s. 282 of the Succession Act (X of 1865) the decree-holder was entitled only to a rateable distribution among the creditors of the estate. *Held*, that in the absence of fraud or collusion the decree and the subsequent sale in execution could not be set aside. *Held*, further, that according to ss. 244 and 13 of the Civil Procedure Code (Act XIV of 1882) the decree having been executed, the execution bound the parties and all persons claiming through them, and that the question was, therefore, *res judicata*. *Per* CHANDAVARKAR, *J.*—"The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative, in whom all the property of the deceased vests as such by virtue of s. 179 of the Succession Act, may be said to be similar to that of the sebait of an idol." *Prosunno v. Golab, L. R. 2 I. A. 145*, referred to and applied. A creditor's action against the estate of a deceased person should be treated as an administration suit. BAI MEHERBAI v. MAGANCHAND (1905) . . . I. L. R. 29 Bom. 96

——— s. 244, cl. (c).

See EXECUTION OF DECREE. I. L. R. 32 Calc. 265

——— ss. 244, 312, 424.

See PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895) (AS AMENDED BY BENGAL ACT I OF 1897), ss. 3, 19, CL. (2) AND 20 . I. L. R. 32 Calc. 130

——— s. 244.

See INSOLVENCY.

See LANDLORD AND TENANT.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, s. 86.

——— s. 244—*"Representative" of judgment-debtor—Rent-decree against recorded tenant—Transferee of portion of occupancy holding before decree—Right to apply to set aside decree on ground of fraud—Right to set aside sale on ground of irregularity, s. 311—"Person, whose immoveable property has been sold"—Bengal Tenancy Act (VIII of 1885), s. 173—Purchase by judgment-debtor in auction-purchaser's name—Application to set aside.*—Where the landlord of an occupancy holding obtains a decree for rent against his registered tenant, an unregistered transferee of the tenant into whose hands a portion of the holding has previously passed is bound by the decree and is therefore a representative of the judgment-debtor within the meaning of s. 244 of the Civil Procedure Code. Principle of Full Bench case, *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar, I. L. R. 24 Calc. 62*, applied. *Kalu Shaha* v. *Bhagabati Debya, 6 C. W. N. 127*; and *Sarala Dasee* v. *Saroda Prosad Bose, Mis. Ap. 398 of 1903* (unreported), not followed. Such a transferee can apply to set aside a sale held in execution of the decree as a "person whose immoveable property has been sold" within the meaning of s. 311 of the Civil Procedure Code. He can also apply under s. 173 of the Bengal Tenancy Act to set aside the sale on the ground that the holding has been purchased by the judgment-debtor in the name of the auction-purchaser. AZGAR ALI v. ASABODDIN KAZI (1905) . 9 C. W. N. 134

——— s. 244—*Representative—Purchaser of a putni tenure bound by rent decree against recorded tenant—Landlord and tenant.*—A person, who acquired a *putni* tenure at a sale in execution of a decree for money against the *putnidar*, but who did not get his name registered in the landlord's office, is bound by the decree for rent against the recorded tenant and is therefore a representative of the judgment-debtor within the meaning of s. 244 of the Civil Procedure Code. *Ishan Chandra Sarkar* v. *Beni Madhub Sirkar, I. L. R. 24 Calc. 62*; and *Asgarali* v. *Asaboddin, 9 C. W. N. 134*, followed. *Umed Rasul Saha* v. *Anath Bundhu Chowdhry, 6 C. W. N. 128*; and *Kameshwar Persad* v. *Run Bahadur Singh, I. L. R. 12 Calc. 458*, not followed. SURENDRA NARAIN SINGH *v.* GOPI SUNDARI DASI (1905) . . 9 C. W. N. 824 I. L. R. 32 Calc. 1031

——— s. 244—*Application in execution—Person entitled to represent estate—Representative of party to decree—Purchaser from judgment-debtor.*—Plaintiffs in a suit obtained a decree for the sale of mortgaged lands, which had belonged to *S*, deceased. The defendants to that suit were a person whom *S* was alleged to have adopted, and the two widows of *S*'s father, who would represent the estate, if the adoption failed. One widow died after suit. After her death part of the mortgaged property was put up for sale and purchased by plaintiffs, who applied for an order for delivery of possession. *D*, the nearest reversioner to *S*, objected, and claimed to be in possession in his own right. He contended that *S* had been adopted only in conjunction with the widow, who had died, and that in

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

consequence his reversionary interest had fallen into possession at her death, the surviving widow having no rights In the alternative he claimed also as a purchaser from the surviving widow under a release deed executed by her after the mortgage decree and before the sale The Subordinate Judge refused to make an order for delivery of possession, and the plaintiffs appealed to the High Court, when a preliminary objection was raised that no appeal lay:—*Held*, that an appeal lay If the inheritance passed to *D* on the widow's death, he would be the person entitled to represent the estate, and the present question related to execution and should be dealt with under s 244 of the Code of Civil Procedure If *D* relied on the release from the surviving widow, he was a representative of one of the parties to the decree and the same result followed *Kasinatha Ayyar* v *Uthumanna Rowthan*, *I L R 25 Mad 523*, discussed SIVARAMA SASTRIAL v SOMASUNDARA MUDALI (1905)

I. L. R. 29 Mad. 119

——— s. 244—*Execution of decree—Decree passed ex parte against father and son on promissory note signed by father alone—Application in execution for arrest of son—Objection to arrest on ground that decree was wrongly passed against son—Maintainability*—A judgment-creditor sued a Hindu father and his son on a promissory note signed only by the father Neither defendant appeared or defended the suit and a decree was passed against both The father died and the judgment-creditor made the present application in execution and asked for the arrest and imprisonment of the son The latter asked the Court to direct that he was not liable to arrest under the decree—*Held*, that the decree had not been passed without jurisdiction and the judgment-debtor was precluded, in execution proceedings, from impeaching the decree, which had been passed without opposition, and which had not been set aside If a decree is passed by a Civil Court, which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it has not been set aside in appeal or otherwise This was not such a case, as the District Munsif was competent to pass a personal decree against the present judgment-debtor, if the evidence required to establish the personal liability had been then produced. The fact that a decree had been passed in the absence of such evidence would not make it a decree passed without jurisdiction *Sardarmal* v *Arunagal Sabhapathy*, *I L R 21 Bom* 203, and *Gomatham Alamelu* v *Komandur Krishnamacharlu*, *I L R 27 Mad 113*, approved RANGASAMY NAIKEN v. THIRUPATI NAIKEN (1905)

I. L. R. 28 Mad. 26

——— s. 244—*Question relating to the execution, discharge or satisfaction of decree—Parties to the suit or their representatives*—A decree-holder in a suit purchased land at a Court auction, which was held in execution of his decree. He made an application for delivery of possession, which was dismissed. His heirs, after his death, made further applications, which were also dismissed. The heirs then sold the land to the present plaintiffs, who thereupon brought the present suit to recover possession of the land—*Held*, (1) that the right of the plaintiffs to recover possession of the land was a question relating to the execution, discharge or satisfaction of the decree; (2) that the question arose between the parties to the suit in which the decree was passed, or their representatives, and (3) that the suit was not maintainable, having regard to s 244 of the Code of Civil Procedure SANDHU TARAGANAR v HUSSAIN SAHIB (1905) I. L. R. 28 Mad. 87

——— s. 244—*Surety becoming liable for decree in a suit—Decree for plaintiff—Execution orders against surety—Suit by surety for declaration of non liability as to portion of decretal amount—Maintainability—Proceeding in execution*—The property of a defendant in another suit having been attached before judgment, the present plaintiff became surety for any sum that might be decreed. A decree was passed and an order was made for its execution against the present plaintiff, and that order was not appealed against. Prior to execution plaintiff brought the present suit against the decree-holders in the previous suit, for a declaration that they were not entitled to execute a portion of their decree as against him:—*Held*, that the suit did not lie, the matter being one to be litigated only in execution proceedings The surety should be treated as a party to the suit, and as the question raised was one relating to the execution of a decree, s. 244 of the Code of Civil Procedure applied and the suit was barred. LINGA REDDY v HUSSAIN REDDY (1905)

I. L. R. 28 Mad. 117

——— s. 244—*Alteration of decree after execution—Application for refund of money realized in execution—Limitation—Limitation Act (XV of 1877), Sch II, Art 178*—A decree for sale under s 88 of the Transfer of Property Act 1882, as drawn up, allowed a very high rate of interest to the decree-holder, and the amount due under this decree as it stood was realized by sale of the mortgaged property Subsequently, on the judgment-debtor's application the decree was amended so as greatly to reduce the rate of interest, and thereby a refund became due to the judgment-debtors *Held*, that the judgment-debtors' application for a refund was not an application in execution, but an application under s 244 of the Code of Civil Procedure, and that the limitation applicable was that prescribed by art 178 of the second schedule to the Limitation Act, 1877, and began to run from the date of the amendment of the decree HARNAM CHANDAR v MUHAMMAD YAR KHAN (1905)

I. L. R. 27 All. 495

——— s 244—*Execution of decree—Sale in execution set aside and purchase money returned—Sale confirmed on appeal—Suit by decree holder to recover purchase money*—A sale held in execution of a decree for money was set aside on application by the judgment-debtor under s 311 of the Code of Civil Procedure and the purchase money

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

was returned. On appeal, however, the order setting aside the sale was reversed and the sale confirmed in favour of the original purchaser. The purchaser however did not pay the sale price, and the decree-holder accordingly sued him for its recovery. *Held*, that the suit did not lie, but the matter was one governed by s. 244 of the Code of Civil Procedure. *Gulzari Mal* v. *Madho Ram, I. L. R. 25 All. 447*, followed. RAHIM-UD-DIN *v.* RAM LAL (1905). I. L. R. 27 All. 155

——— s. 244—*Execution of decree—Questions in execution—Mortgage by conditional sale—Decree for foreclosure—Payment by puisne mortgagee defendant in prior mortgagee's suit for foreclosure—Application by such puisne mortgagee for decree absolute for foreclosure—Transfer of Property Act, ss. 74 and 86—Form of decree.* In a suit brought by the respondent as prior mortgagee for foreclosure of a mortgage by conditional sale, in which the appellant, a second mortgagee of the same property, was a defendant, a decree was passed for foreclosure and allowing six months for redemption, and a similar decree was made in a suit brought by the respondent and the appellant as second mortgagees. Eventually, as the mortgagors (the other defendants) made no payment to secure redemption, and in order to prevent a decree absolute for foreclosure against himself, the appellant paid into Court the sum due under the decree in the first suit, and it was drawn out by the prior mortgagee. The appellant then made an application to the Court in that suit that, as he had by his payment become, under s. 74 of the Transfer of Property Act, the representative of the prior mortgagee, a decree absolute for foreclosure might be passed in his favour. The Court held that he was entitled to bring a suit for foreclosure, but that "he had not acquired the status of a decree-holder" and that "while he was a defendant he could not execute the decree as a decree-holder," and the application was dismissed. *Held*, by the Judicial Committee (reversing the decision of the High Court) that a subsequent suit brought by the appellant for foreclosure was not barred by s. 244 of the Civil Procedure Code, the questions between the parties not being such as could have been determined by the Court in execution of the decree in the former suits. That decree (which appeared to be a transcript of the form of order given in s. 86 of the Transfer of Property Act) did not provide for the exercise by the puisne incumbrancer of their successive rights of redemption or for working out the rights of the parties in the event of a puisne incumbrancer, in front of the mortgagor, redeeming the mortgaged property. An appropriate decree for that purpose in use in the English Courts given in Seton on Decrees, 6th Edition, Vol. III, p. 1979, referred to. GOPI NARAIN KHAUNA *v.* BANSIDHAR (1905) . . . . I. L. R. 27 All. 325

——— s. 244—*Execution of decree—Sale in execution—Application to set aside sale on the ground of fraud.*—An application to set aside on the ground of fraud a sale held in execution of a decree can be made under s. 241 of the Code of Civil Procedure even after the sale has been confirmed. *Moti Lal Chakrabutty* v. *Russick Chandra Bairagi, I. L. R. 26 Calc. 326, footnote*, and *Durga Charan Mandal* v. *Kali Prasanna Sarkar, I. L. R. 26 Calc. 727*, followed. *Prosanno Kumar Sanyal* v. *Kali Das Sanyal, I. L. R. 19 Calc. 683*, referred to. WAHID-UN-NISSA *v.* GIRDHARI (1905) . . . . I. L. R. 27 All. 702

——— s. 244—*Mortgage—Satisfaction by mortgagor of decree for sale on a prior mortgage with money borrowed on the security of a subsequent mortgage of the same property Rights of subsequent mortgagee.*—A decree for sale and an order absolute for sale had been passed against a mortgagor. The mortgagor then borrowed more money on a mortgage of several villages, including those previously mortgaged, and applied a portion of such money in satisfying the previous decree for sale. The subsequent mortgagee then brought a suit upon her mortgage, in which she sought to bring to sale the villages, which were the subject of the previous mortgage and decree. *Held*, that she could do so. S. 244 of the Code of Civil Procedure did not apply, and there was no reason why the plaintiff should be driven to recover part of her loan by executing the previous decree and the remainder by suit on her mortgage. *Bansi Dhar* v. *Gaya Prasad, I. L. R. 24 All. 179*, distinguished. TUFAIL FATMA *v.* BITOLA (1905) . . I. L. R. 27 All. 400

——— s. 244—*Limitation Act (XV of 1877), Sch. II, Art. 178 Appeal—Order refusing application for appointment of commissioner to effect division of property by metes and bounds in partition suit.*—The parties to a suit for partition entered into a compromise, which was recorded by the Court and by which their respective shares in the family property were agreed upon. An application was subsequently made for the appointment of a commissioner to effect an actual division of the property, but the Subordinate Judge dismissed it on the ground that the right to claim further relief in the matter had become barred by limitation. This order was reversed on appeal and the case was remanded by the District Judge for disposal according to law. An appeal was then preferred to the High Court against the order of remand, when it was contended that no appeal lay to the District Judge against the order of the Subordinate Judge:—*Held*, that an appeal lay. The order of the Subordinate Judge on the face of it purported to decide a question to be dealt with under s. 244 of the Code of Civil Procedure and was therefore a decree within the meaning of that term in the Code, and that the party against whom it was passed was entitled to appeal therefrom. Even if there was no decree to be executed, and the Subordinate Judge erroneously supposed the matter to be one in execution, and held the application to be barred, such usurpation of jurisdiction could not make the order passed in consequence thereof less appealable than would have been the case

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

debt—Debt payable in future—Attachment of part already accrued due.—A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such, is attachable in execution—being a debt, accruing due and actually existing with a right to payment on and after the first of the following month. The decree-holder applied on the 21st December for the issue of a prohibitory order in respect of a half of the allowance for the month of December, and the order was issued on the 23rd December. *Held*, that the attachment was validly made, inasmuch as three weeks of the December allowance had already become an existing debt, though payable on a future date. *Haridas Acharjia* v. *Barada Kissore Acharjia, I. L. R. 27 Calc. 38; Tuffuzzool Hossein Khan* v. *Rughoo Nath Pershad, 14 Moo. I. A. 40*, referred to. DAMBAR KOERI v. RAI SHAM KISSEN DAS (1905) . . . . . **9 C. W. N. 703**

———— s. 268—*Mortgage debt—Attachment—Copy of order, not affixed in Court-house—Illegality.*—A mortgage-debt was attached, but no copy of the attachment order was affixed in the Court house as required by s. 268 of the Civil Procedure Code: *Held*, that the plaintiff, who took an assignment of the mortgage bond four days after the order of attachment, acquired a valid title, the attachment being ineffectual. SATYA CHARAN MUKHERJEE v. MADHUB CHUNDER KARMOKAR (1905).

9 C. W. N. 693

———— s. 273.

See SALE . **I. L. R. 32 Calc. 1104**

———— ss. 276, 295—*"Assets realised by sale or otherwise in execution of a decree," what are.*—The words "assets realised by sale or otherwise in execution of a decree" in s 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached. The assets are not realised by the attachment, but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under s. 295 of the Code of Civil Procedure. *Gopal Dai* v. *Chunni Lal, I. L. R. 8 All. 67*, and *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi, I. L. R. 6 Bom. 588*, referred to and approved. *Lakshmi* v. *Kuttunni, I. L. R. 10 Mad. 57*, and *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia, I. L. R. 16 Bom. 91*, referred to. *Manilal Umedram* v. *Namabhai Maneklal, I. L. R. 28 Bom. 264*, distinguished. *Sew Bux Bogla* v. *Shib Chunder Sen, I. L. R. 13 Calc. 225*, and *Prosonnomoyi Dassi* v. *Sreenauth Roy, I. L. R. 21 Calc. 809*, approved. An attachment ceases to be operative from the moment money is paid into Court or at the latest from the time satisfaction is

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

entered. *Kunhi Moossa* v. *Makki, I. L. R. 23 Mad. 482.* VIBUDHAPRIYA TIRTHASWAMI v. YUSUF SAHIB (1905) . **I. L. R. 28 Mad. 380**

———— ss. 278, 281, 283.

See LIMITATION . **I. L. R. 32 Calc. 537**

———— s. 278—*Execution of decree—Decree for sale on a mortgage—Prior mortgagee not entitled to intervene in execution proceedings.*—In a suit for sale on a mortgage the plaintiff obtained a decree and an order absolute for sale of the mortgaged property. A person who had not been a party to the suit intervened, alleging himself to be a prior mortgagee, and objected to the sale, and the sale was stopped. *Held*, that the prior mortgagee, if he were one, was not entitled to intervene in these execution proceedings and that the order allowing his objection was passed without jurisdiction and was a proper subject for revision. HUKAM SINGH v. RAGHUBIR SARAN (1905) . **I. L. R. 27 All. 700**

———— ss. 278, 283—*Limitation Act, Sch. II, Art. 12—Suit to establish right to property sold in execution Limitation—Sale without decision as to rights of intervenor.*—When an intervenor claims a share of attached property the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the Court omits to do so, and sells the attached property subject to the intervenor's claim, this is no valid order under ss. 280, 281 or 282 of the Code of Civil Procedure, and the limitation of one year for a suit under s. 283 of the Code does not apply. *Manohar Khan* v. *Troyluckonath Ghose, 4 W. R. 35*, followed. UDIT NARAIN SINGH v. MURTAZA KHAN (1905).

I. L. R. 27 All. 464

———— s. 283—*Execution of decree—Suit for declaration that property is liable to attachment and sale—Valuation of suit.*—A decree-holder holding a decree from a Court of Small Causes, which has been transferred to a Munsif for execution, attached certain property as that of the judgment-debtor. The judgment debtor's wife objected under s. 278 of the Code of Civil Procedure that the property was hers. This objection prevailed, and the property was released from attachment. The decree-holder then filed a regular suit against the objector and the judgment-debtor to have it declared that the property was liable to attachment and sale in execution of her decree. *Held*, that the proper valuation of such suit for the purposes of jurisdiction was the amount of the decree under [illegible] not the value of the [illegible] Das v. Ka[illegible] explain[illegible] (19[illegible]

[illegible] applications made in second [illegible] well as first appeals.—S. 587 of the [illegible] of Civil Procedure authorises an application to [illegible]ing in a plaintiff-respondent in second appeals and extends to such appeals the provisions of ss. 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under ss. 368 and 582 and for the purposes of limitation fall

HINDU LAW—ALIENATION—*continued*

first defendant declared invalid:—*Held*, that the suit was barred under Art 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right had ceased to exist through the operation of the Law of Limitation. *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram*, *I L R 23 Mad 271* referred to The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word. PUNGANTAM JAGANNADHA ROW v RAMADOSS PATNAIK (1905) I. L. R. 29 Mad. 197

——— *Mitakshara—Alienation of impartible Raj—Legal necessity debt for—Custom—Successor, liability of—Pachis Sawal, authority of*—Alienation by the proprietor of an impartible Raj which is inalienable by custom, is valid if made for legal necessity; and his successor, who takes the Raj by right of survivorship is, under the Mitakshara law liable for the debts proved to have been contracted for legal necessity The *Pachis Sawal* is a work of authority in respect of customs prevailing among the Rajas of the Tributary Mehals of Cuttack *Dillonund Murdiraj* v *Sree-Lurum Juggernath 3 W R 116*, referred to GOPAL PROSAD BHARAT v RAGHUNATH DEB (1905) . . . . I. L. R. 32 Calc 158

——— *Widow alienation by—Reversioners—Declaratory decree suit for—Limitation Act (XV of 1877), Sch II Arts 91, 120, 125—Void transaction*—Where a Hindu widow succeeding to her husband's estate had, without any authority from him, executed jointly with her mother in law a deed of gift purporting to dedicate the bulk of his property for the sheba of certain idols:—*Held*, that the transaction was altogether void The deed of gift being *ab initio* void as against the reversionary heir, a suit by him to obtain a declaratory decree that the instrument is invalid and not binding upon him is governed by Art. 120, Sch II of the Limitation Act, and not by Art 91 it being not necessary for him to have it cancelled or set aside in order to obtain such declaratory relief *Banku Behari Shaha* v *Krishto Gobindo Joardar*, *I L R 30 Calc 433*, relied upon. CHOORAMANI DASI v BAIDYA NATH NAIK (1905) I. L. R. 32 Calc 473

——— *Suit by a reversioner to set aside a sale by a widow—Alienation by a widow—Limitation Act (XV of 1877) Sch II, Arts 91, 141—Question of law—Admission by a pleader on a question of law, effect of—Appeal—Practice*—When upon the death of a Hindu widow a suit was brought by the reversioner for recovery of property which it was alleged had been alienated by the widow by a deed of sale during her lifetime without legal necessity:—*Held*, that Art. 141 of the Second Schedule of the Limitation Act applied and Art. 91 had no application. A question of law which was not argued in the lower Appellate Court, was allowed by the High Court to be urged in second appeal PAR

HINDU LAW—ALIENATION—*concluded*

GITEE, *J*—A sale by a Hindu widow is of itself void upon her death, whereas a lease is merely voidable at the heir's election. WOODROFFE, *J*—All alienations by a Hindu widow made without legal necessity are voidable and not void in the sense that they are good for her lifetime and may be the subject of consent or ratification by the reversioners during such lifetime or after her death. In the absence, however of any such ratification or consent by the reversioners the title passed *ipso facto* ceases upon the death of the widow and it is not necessary to set aside such alienations within the meaning of Art. 91 of the Second Schedule to the Limitation Act. HARIHAR OJA v DASARATHI MISRA (1905) 9 C W. N 836

HINDU LAW—CUSTOM.

——— *Family custom—Impartible raj—Separate acquisitions of holder of impartible raj—Presumption*—One Raja Fateh Sahi was the owner of a "raj riasat," to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of 'babuai" allowance. The bulk of the property of the riasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur After the battle of Buxar, in 1764, the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government, until 1801 *Held*, that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran, and *semble* that, even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in Saran these customs, being part of the personal law of the family, would still govern such after-acquired property It is of the essence of family usages that they should be certain invariable and continuous and well established discontinuance must be held to destroy them Where, however, such a custom has been proved the onus is upon the party, who alleges the discontinuance thereof, to prove that fact. *Raj Keshan Singh* v *Ramjoy Surma Mazoomdar*, *I L R 1 Calc 186*, and *Soorendro Nath Roy* v *Mussammat Heeramonee Burmonean*, *12 Moo I A 81*, referred to. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom. A compromise between members of a Hindu family whereby "babuai" allowance is fixed and a dispute with regard to the family property is terminated will, if just and legal be binding on the minor children of the parties thereto *Pitam Singh* v *Ujagar Singh*, *I L R 1 All 651*, and *Chamrirapa* v *Dandea I L R 19 Bom. 593* referred to If the owner of

HINDU LAW—CUSTOM—*concluded.*

an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmipathi* v. *Kandasami, I. L. R. 16 Mad. 54,* and *Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik, I. L. R. 17 Mad. 422,* referred to. SARABJIT PARTAP BAHADUR SAHI *v.* INDARJIT PARTAP BAHADUR SAHI (1905).
I. L. R. 27 All. 203

HINDU LAW—DEBTS.

———*Joint Hindu family—Personal decree against father—Liability of son's interests in the joint family property.*—When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale, if the latter can show that the debt in respect of which such decree was obtained, was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay. *Ram Dayal* v. *Durga Singh, I. L. R. 13 All. 209,* overruled. *Beni Madho* v. *Basdeo Patak, I. L. R. 13 All. 99; Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden, L. R. 16 I. A. 1,* and *Mussamut Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1,* refered to. KARAN SINGH *v.* BHUP SINGH (1905).
I. L. R. 27 All. 16

———*Liability of undivided son for surety debt contracted by father.*—Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of such obligation. *Sitaramayya* v. *Venkatramanna, I. L. R. 11 Mad. 373,* and *Tukarambhat* v. *Gangaram, I. L. R. 23 Bom. 454,* followed. CHETTIKULAM VENKITACHALA REDDIAR *v.* CHETTIKULAM KUMARA VENKITACHALA REDDIAR (1905) . . I. L. R. 28 Mad. 377

HINDU LAW—ENDOWMENT.

———*Succession to property of Mahant—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.*—A mortgagee, who was the Mahant of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held,* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh) that the plaintiff on his succession

HINDU LAW—ENDOWMENT—*concluded.*

was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage. BISHAMBAR DAS *v.* DRIGBIJA I SINGH (1905) . . I. L. R. 27 All. 581

———*Religious endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice.*—A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office. *Mayandi Chettiar* v. *Chokkalingam Pillay, I. L. R. 27 Mad. 295,* and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami, I. L. R. 27 Mad. 435,* followed. Where, however, a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure-holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice. NARASIMHA CHARI *v.* GOPALA AYYANGAR (1905) . . . . I. L. R. 28 Mad. 391

HINDU LAW—GIFT.

———*Gift to wife—Powers of alienation of donee—Construction of document.*—Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik) together with land revenue, miscellaneous items, etc." Then came this provision :—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect. *Held,* that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage, unless a legal necessity arose for doing so. *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834,* referred to. JAMNA DAS *v.* RAMAUTAR PANDE (1905).
I. L. R. 27 All. 364

———*Gift to daughter out of joint-property—Limits of propriety—Joint family—Hindu Law.*—The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to R15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), the gift was valid, and did not exceed the limits of propriety. BACHOO *v.* MANKOREBAI (1904).
I. L. R. 29 Bom. 51

HINDU LAW—GIFT—*concluded*

——— *Will—Unregistered memorandum of an oral gift—Subsequent disposal by will—Presumption of advancement—Indian Trusts Act (II of 1882), s 82—Transfer of Property Act (IV of 1882), s 123*—According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife, or of an advancement for her benefit. *Per* BATTY *J*—In India, as a general rule, the criterion as to ownership of property is the source from which the purchase money was supplied; but it is not the sole criterion, and depends on the presence or absence of rebutting circumstances. Among Hindus the grounds against assuming advancement are specially unfavourable to the claim of a widow to an absolute estate. A Hindu widow brought a suit against the executor of her husband's will for a declaration that she was the sole owner of a house, which was purchased in her name by her husband and which was subsequently otherwise disposed of by her husband in his will. *Held*, that the plaintiff had not established her title to the house and that the disposal by will was valid. BAI MOTIVAHOO v PURSHOTAM DAYAL (1905)

I. L. R 29 Bom. 306

HINDU LAW—GUARDIAN

——— *Specific performance, suit for—Agreement to sell immoveable property—Agreement by Hindu mother as natural guardian of infant son—Son's death—Suit against mother as heir—Legal necessity—Specific Relief Act (I of 1877), s 18—Transfer of Property Act (IV of 1882), s 43*—As natural guardian of her infant son, a Hindu mother has no power to sell immoveable properties belonging to the infant except for legal necessity. Where, there being no legal necessity, a mother contracted to sell immoveable property belonging to her infant son not in her personal capacity, but as the mother and next friend of the latter and subsequently on the infant's death inherited the property. *Held*, that a suit for specific performance of the contract could not be maintained against her. Neither s. 18 of the Specific Relief Act nor s. 43 of the Transfer of Property Act applied to the case. PASH MOVI DASSI v SOORJA KANTA ROY CHOWDHURI (1905)

9 C. W. N 1019

HINDU LAW—INHERITANCE.

———*Mitakshara law—Descent of impartible property—Rule of primogeniture—Evidence—Palayam, nature of—Acceptance by palayagar of sanad under Madras Regulation XXV of 1802, effect of succession to palayam—Zamindari of Udayarpalayam—Maintenance amount of—Privy Council, practice of*—When impartible property passes by survivorship from one line of descent to another it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line *Naraganti Achammagaru* v *Venkatachalapati Nayanivaru, I L R 4 Mad 250* approved. The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it *Srimanta Raja Yarlagadda Mallikarjuna* v *Srimanta Raja Yarlagadda Durga L R 17 I A 134: I L R 13 Mad 400*, followed. The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate—*Held*, in the evidence and circumstances of the case, and in accordance with the above principles that the zamindari of Udayarpalayam represented the ancient palayam of Udayar, which was in its origin and up to the expulsion of the Palayagar in 1765 an impartible estate held by one member of the family only and not subject to the ordinary rule of Hindu law; and that notwithstanding the acceptance by the palayagar in 1817 of such a sanad and the fact that it was circumscribed in extent, the palayam retained its character of impartibility and descended to the first defendant, a grand nephew in the senior line, in preference to the plaintiff, a nephew in a junior line of descent, as it was granted and accepted as equivalent in value to the ancient palayam. The Judicial Committee will not interfere in a question as to the amount of maintenance, which is matter to be dealt with by the Courts in India. KACHI KALITANA PANGAPPA KALAKKA THOLA UDAYAR v KACHI UVA RENGAPPA KALAKKA THOLA UDAYAR (1905) I L. R. 28 Mad. 508
L. R. 32 I. A. 261

——— *Inheritance—Disqualification of daughter—Unchastity—Marriage with Mahomedan during lifetime of undivorced Hindu husband—Legitimacy of issue—Act XXI of 1850*—Where a Hindu married woman embraced Islamism and married a Mahomedan according to the forms of Mahomedan law, and had sons by him during the lifetime of her Hindu husband without having been divorced from the latter—*Held*, that as the sons were illegitimate, she was in the position of an unchaste daughter, and was, under Hindu Law, disqualified from inheriting her father's property *Dhan Bibi* v *Lalon Bibi, I L R 27 Calc 801*, and *Ramananda* v *Ratikishori Barmani, I L R 29 Calc 847*, referred to. The provisions of Act XXI of 1850 cannot save her right of inheritance, because she had not lost such right by reason of her renouncing or being excluded from the Hindu communion *Bhagwant Singh* v *Kallu I L R 11 All 100*, distinguished. SUNDARI LETANI v PITAMBAR LETANI (1905) I. L. R. 32 Calc. 871
9 C. W. N 1003

——— *Inheritance—Primogeniture, rule of—Custom—Orissa, land tenure in—Regulation XI of 1793—Regulation X of 1800—Regulation XII of 1805 s 36—Khunyan—Pukaraj—Killa—Garh—Hereditary office, e tate attached to—Evidence Act (I of 1872) ss 13 (b), 32 (3) & (5) 42, 90—Statements of persons who are dead—Usage, opinion as to—Ancient document, custody of—Regulation VII of 1832, s 9*—The rule of primogeniture may exist by family custom although the estate

HINDU LAW—INHERITANCE—*concluded.*

may not be a raj or a polliam. *Chintamun Singh* v. *Nowlukho Konwari, I. L. R. 1 Calc. 153 : L. R. 2 I. A. 263*, followed. The law, as prescribed in the Regulations, expressly allows the rule of primogeniture to prevail in the district of Cuttack in cases in which by established usage succession to the entire estate devolves to a single heir, provided the rule is shown to have been in existence at the time of Regulation XII of 1805, and has not since been departed from. *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar, I. L. R. 1 Calc. 186 : 19 W. R. 8*, referred to. Words like *Bhunyan* and *Paharaj* used as titles of the owners of an estate in Orissa, and words like *Killa* and *Garh* used as descriptive of the estate were held, when read in connection with passages from standard works of reference on land tenure in Orissa, and taken in connection with the evidence adduced in the case, to furnish a proper basis for the inference that the estate, being attached to and devolving with some office, descended only to the eldest son as the public holder of the office. The statement in a genealogical table filed by a member of a family, who is dead, regarding the descendants of another member of the family, before any question arose as to the latter, is relevant under s. 32 (5) of the Evidence Act. SHYAMANAND DAS MOHAPATRA v. RAMA KANTA DASS MOHAPATRA (1905).

I. L. R. 32 Calc. 6

HINDU LAW—JAINS.

——— *Hindu Law—Jains—Performance of funeral ceremonies—Minor son—Widow.*—According to Hindu Law, which applies in this respect to Jains, the son of a deceased person has the preferential right to the performance of the monthly, six monthly and anniversary ceremony of the deceased. It is not only his right, but his religious duty. In default of the son (which term includes the grandson and great-grandson), it is the duty of the widow to get them performed, where the husband has died in division and the widow becomes his heir. The widow is not only interested in the performance of the ceremonies, but where the son is a minor it is her religious duty to see that they are duly performed. SUNDARJI DAMJ v. DAHIBAI (1905).

I. L. R. 29 Bom. 319

HINDU LAW—JOINT FAMILY.

——— *Partnership with manager of joint family—Death of manager, effect of—Joint family and joint family business, nature of—Partner, right of, to sue for particular assets after suit for general account barred—Limitation Act (XV of 1877), Sch. II, Art. 106.*—Where *K*, the manager of a joint Hindu family, enters into a partnership for the family benefit with *S*, a stranger to the family, the partnership is dissolved on the death of *K*, in the absence of any agreement with the survivors. How far a joint Hindu family resembles a corporation sole and how far a joint family business resembles a partnership considered. *Samalbhai Nathubhai* v. *Someshvar, Mongal, and Harkisan, I. L. R. 5 Bom. 38*, referred to. Although a suit for general account of a partnership will be barred under Sch. II, Art. 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share of any particular assets received by a partner after such dissolution, if such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable. *Merwanji Hormusji* v. *Rustomji Burjorji, I. L. R. 6 Bom. 629*, and *Knox* v. *Gye, L. R. 5 H. L. 656*, followed. SOKKANDHA VANNIMUNDAR v. SOKKANADHA VANNIMUNDAR (1905) . . I. L. R. 28 Mad. 344

——— *Hindu Law—Dayabhaga—Decree against kurta—Debt incurred for joint family purpose—Execution when available against joint family property—Effect, when kurta sued in personal capacity—Representative capacity—Parties—Agency—Difference between Dayabhaga and Mitakshara law.*—When a debt is contracted by the managing member of a joint family for a joint family purpose, the joint family and not the managing member alone becomes liable for it. There is no difference between the Mitakshara and the Dayabhaga School of Law in this matter. But a decree for such a debt, obtained against the managing member alone, where the other members are adults, cannot be executed against the joint family property, if the managing member was sued not in his representative, but in his personal capacity. DWARKA NATH CHOWDHURY v. BUNGSHI CHANDRA SAHA (1905).

9 C. W. N. 879

——— *Kurta as administrator, powers of—Personal bond of kurta, if binding on co-parcener—Probate and Administration Act (V of 1881), s 90.*—A *kurta* of a joint Hindu family cannot cast the obligation of a personal bond on his co-parceners. The co-parceners, however, might become liable on the bond, if the *kurta* was acting as their agent or if they subsequently acquiesced in it. *Chalamlya* v. *Varadayya, I. L. R. 22 Mad. 166*; and *Krishna Ramya* v. *Vasudeb Venkatesh Pai, I. L. R. 21 Bom. 893, 816*, referred to. *Obiter*—A *kurta* of a joint Hindu family, who is also the administrator of the joint estate, cannot exercise powers as *kurta*, which he is directly prevented from exercising as administrator. *Shurrut Chunder* v. *Raj Kishen Mukherjee, 15 B. L. R. 350*, referred to. RANJIT SINGH v. AMULYA PROSAD GHOSE (1905).

9 C. W. N. 923

HINDU LAW—MAINTENANCE.

——— *Hindu widow's right of maintenance out of husband's estate—Principles on which Court should ascertain amount of such maintenance.*—Case in which the principles to be followed in ascertaining the amount of separate maintenance payable to a Hindu widow out of her husband's estate are discussed and defined. KAROONAMOYEE DABEE v. ADMINISTRATOR-GENERAL OF BENGAL (1905).

9 C. W. N. 851

HINDU LAW—MARRIAGE.

——— *Marriage—Remarriage—Death of the son by first husband—Succession to the son.*—A remarried Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the remarriage *Akora Sath* v. *Boreani*, 2 *B L R 199*, followed. BASAPPA v RAYAVA (1905) . . I. L. R. 29 Bom. 91

HINDU LAW—PARTITION.

———*Mitakshara, Ch I, ss 6, 7, Ch II, s 9, Ch VI, s 4—Partition—Father—Son—Mother's share, allotment and enjoyment of—Maintenance.*—Under the Mitakshara law when partition of joint family property takes place, during the father's lifetime, at the instance of a son, the mother of the son is entitled to a share equal to that of her husband and her son, and she is entitled to have the share separately allotted, and to enjoy that share when so allotted. *Suraj Bunsi Koer* v *Sheo Prosad Singh*, *I L R 5 Calc. 148*; *Parsid Narain Singh* v *Honooman Sahay*, *I L R 5 Calc 843*, *Samrun Thakur* v *Chunder Mun Misser*, *I L R 8 Calc 17*; and *Deendyal Lall* v *Jugdeep Narain Singh I L. R 3 Calc 198*, relied upon. *Quære*: Whether a share so allotted to a mother is in lieu of her maintenance DULAR KOERI v DWARKANATH MISSER (1905) I L. R. 32 Calc. 234 s.c 9 C W. N. 270

HINDU LAW—RESTITUTION OF CONJUGAL RIGHTS

———*Suit for restitution of conjugal rights—Plaintiff's suit not barred by his being out of caste—Held*, that to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. It is not a defence that the plaintiff is out of caste, nor ought a decree to be made conditioned on the plaintiff being restored to caste. *Paige* v *Sheo Narain*, *I L. R 8 All 78*, and *Bindo* v *Kaunsilia*, *I L R 13 All 128*, referred to. SAHADUR v. RAJWANTA (1905) I L R 27 All 98

HINDU LAW—REVERSIONER.

——— *Right of suit—Remote Reversioner—Declaratory decree—Nearest Reversioner, interests of—Specific Relief Act (I of 1877) s 42*—A declaratory suit by a remote reversioner, who would take an absolute interest, is maintainable in the presence of the immediate reversionary heir, who is only the holder of a life-estate, under s 42 of the Specific Relief Act (I of 1877) *Ishwar Narain* v *Janki*, *I L R. 15 All 132*, dissented from Where the nearest reversioner precludes himself or herself from maintaining a declaratory action by omitting to sue within the statutory period and thus practically concurs in an alleged improper alienation, the remote reversioner is entitled to maintain the suit *Govinda Pillai* v. *Thyammal*, *14 Mad*

HINDU LAW—REVERSIONER—continued

L. J 202, followed. ABINASH CHANDRA MAZUMDAR v HARINATH SHAHA (1905). I. L. R. 32 Calc. 62 s c 9 C. W. N. 25

HINDU LAW—STRIDHAN.

——— *Dayabhaga, Ch IV, ss 3, 29, 31, 33, 35 39—Stridhan, succession to—Step sister's son—Husband's elder brother.*—Under the Dayabhaga law a step sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother DASHRATHI KUNDU v BIPIN BEHARI KUNDU (1905) I L R 32 Calc. 261 s.c 9 C. W. N. 119

——— *Savings or property purchased out of savings by widow out of money awarded to her by decree as maintenance—Stridhanam—Devolution on daughter and on daughter's daughters.*—*K*, a Hindu widow, purchased property with money received by her under a decree awarding maintenance made payable to her out of the revenues of a zamindari She never had any right to or possession of her husband's estate, which was always in the hands of other persons, who were entitled thereto *K* died leaving a daughter *M* her surviving, who subsequently also died leaving three daughters The three daughters of *M* sold the property to plaintiffs, who brought this suit for a declaration that they were entitled to certain shares in the property and for delivery of the same For the defence it was contended that the property in question was not the stridhanam of *K*, that *K* had taken only a limited and qualified interest therein, and that on *K's* death it devolved on her husband's lineal male descendants and that, in consequence, the sale to plaintiffs conferred on them no title to the property:—*Held*, that the property was *K's* stridhanam, and, consequently, *M* was, on her death, heir to it. There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. As, in the present state of the law, the income is completely dissociated from the corpus, there is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it *Akkana* v *Venakya*, *I L R 25 Mad 351*, approved; *Saodamini Dasi* v *The Administrator General of Bengal*, *L R 20 I A 12*, followed; *Isri Dut Koer* v *Musumut Hanshutti Koerain*, *L R 10 I A 150*, distinguished, *Soorjah Dosee* v. *Bhoobun Mohun Neogky*, *I L R 15 Calc 293*; *Beni Pershad* v *Puranchand*, *I. L. R 23 Calc 262*, *Chhiddu* v *Nanhai*, *I L R. 24 All 67*, and *Sheo Shankar Lal* v *Debi Sahai*, *I L. R 25 All. 468*, commented on. *Held also*, that as a daughter's daughter is entitled to take (in preference to a daughter's son), the

HINDU LAW—STRIDHAN—*concluded.*

stridhanam of the grandmother, *K's* stridhanam passed, on the death of her daughter *M*, to *M's* daughters, who took only a limited and qualified estate. SUBRAMANIAN CHETTI *v.* ARUNACHELLAM CHETTI (1905) . . . . I. L. R. 28 Mad. 1

HINDU LAW—WIDOW.

———— *Hindu widow—Sale by widow of deceased husband's property, partly for legal necessity and partly not—Suit by next reversioner to recover property on death of widow—Limitation Act (XV of 1877), Sch. II, Art. 141.*—A separated Hindu died, leaving him surviving his mother, two widows and a daughter. After the death of the mother and the widows, the daughter sued to recover certain property, which had belonged to her father, but had been sold, by means of two sale-deeds, after his death by one of his widows. On the finding that one of the sales had been effected partly for legal necessity and partly not, and the other not for legal necessity, the Court decreed the plaintiff's claim as to the first sale on payment of such amount of the consideration for the sale as were supported by legal necessity, and as to the second sale unconditionally. On the finding that the suit was brought within twelve years from the date of the death of the widows, who both survived the plaintiff's grandmother, it was *held* that the suit was not barred by limitation. *Govind Singh* v. *Baldeo, I. L. R. 25 All. 330,* and *Jhamman Kunwar* v. *Tiloki, I. L. R. 25 All. 435,* followed. RAM DEI KUNWAR *v.* ABU JAFAR (1905) . . . I. L. R. 27 All. 494

HINDU LAW—WIFE.

———— *Husband and wife—Hindu law—Restitution of conjugal rights—Husband living with prostitute in his house—Cruelty, legal—Husband and wife.*—Where the husband, a Brahmin, having expelled his wife was living in his house with a low caste prostitute, his claim for restitution of conjugal rights was, in the circumstances of the case, disallowed. HARINGTON, *J.*—A Court is not bound to order a Hindu wife to return to her husband, where there is reasonable ground for apprehending that a return to that husband will imperil her safety. MOOKERJEE, *J.*—There may be cases in which something short of legal cruelty may bar a suit for restitution of conjugal rights, and the present case was eminently one of that description. *Dular Koer* v. *Dwarka Nath Misser, 9 C. W. N. 510. Semble* —Keeping a concubine in the house by the husband would be a sufficient justification for the wife to ask for separate habitation and separate maintenance. DULAR KOERI *v.* DWARKA NATH MISSER (1905). 9 C. W. N. 270

HINDU LAW—WILL.

———— *Will, construction of—Effect of gift without words of severance to persons forming an undivided Hindu family—Gift 'in equal shares' Tenant in common—Share of will pass to his*

HINDU LAW—WILL—*continued.*

representatives—'Grandsons being sons' sons include a grandson by adoption—Analogy between an adopted son and an appointee under a power.—*C* died in 1881 leaving him surviving three sons, *Y* the plaintiff, *M* the first defendant and *P*. *P* died in 1896, leaving a son *B*, who died in the same year. The second defendant was the son of the first defendant *M*, the third defendant was the adopted son of the plaintiff *Y*, and the fourth defendant was the widow of *B*. The second and third defendants and *B* were alive at the time of *C's* death in 1881. The third defendant was adopted by the plaintiff in 1897. *C* by his last will and testament, dated 12th May 1881, disposed of three houses (referred to as Nos. I, II and III). The disposition in regard to No. I was in these terms, " . . . therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same "—subject to a payment of a small rent in respect thereof for charity. As regards Nos. II and III the will provided 'that out of a total income of R560 (being the total amount of the income of rent per month) deducting the aforesaid expenses of R181 the remaining amount whatever it may be shall be divided and paid by my executors to my three sons in equal shares' . . . . 'my executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties.' The plaintiff brought this suit to have the will construed:—*Held, per* SIR ARNOLD WHITE, *C.J.*, that under the will of *C* house No. I vested absolutely in his three sons as members of a joint Hindu family and that the law of inheritance in undivided Hindu families applied. *B* having died without male issue his interest passed by survivorship to *Y* and *M* to the exclusion of his widow, the fourth defendant. *Held further,* that the sons took a limited estate as tenants in common in the income of Nos. II and III in the nature of an estate for lives, which subsists till the death of the last survivor, when this limited estate comes to an end and the provision for the division of the corpus will be carried out. On a proper construction of the will such limited estate of each son passed on his death to his representatives and not to the survivors. The interest of *P* went to his son *B* and on *B's* death his widow, the fourth defendant, took a widow's estate in her husband's interest. *Bryan* v. *Twigg, L. R. 3 Eq. 433, Pearce* v. *Edmeades, 51 R. R. 569,* and *M'Dermott* v. *Wallace, 59 R. R. 441,* referred to and distinguished. *Held also,* that the third defendant, the adopted son of the plaintiff, took an interest under the will as grandson of *C*. *Per* SUBRAHMANIA AYYAR, *J.*—As regards item No. I the words from 'son to grandson' were words of purchase importing a grant of absolute property under the Hindu Law and the sons took an absolute estate. Having regard to the statement in the will that the testator formed an undivided family with his sons, and also to the fact that in disposing of the income and corpus of items Nos. II and III he had used the expressions, 'in equal shares' and 'according to their respective shares' to indicate a tenancy in common, the devise of item No. I

HINDU LAW—WILL—*continued*

without such qualifying words was clear evidence of an intention, that the sons should take as a Hindu coparcenary with rights of survivorship The fourth defendant therefore could claim no share in item No I *Jogeswar Narain Deo* v *Ram Chand Dutt*, *L R 23 I A 37*, referred to and distinguished *Held further*, that as regards items Nos II and III the sons took an interest in the income only as tenants in common. The gift of the income being in equal shares and not limited to each son for his life, the share of each on his death went to his representatives. The fourth defendant therefore took the share of her husband as his heir The division of the income among those entitled will not cease until the time for the division of the corpus arrives which will not be so long as any of the sons of the testator is alive. *Held also*, that as regards the corpus of items Nos II and III the words in the will 'my own grandsons being my sons' sons' include a grandson by adoption and that therefore the third defendant took an equal share with the other two grandsons The right of the adopted son is analogous to that of an appointee under a power given by the donor as regards the effectuation of the gift, and the gift to an appointee will be good, if he be a person in existence at the testator's death. *Bai Motichaboo* v *Bai Mamoobai*, *L R 24 I A 93* referred to. VETHIRAJULU NAIDU v MUKUNTHU NAIDU (1905)

I. L R 28 Mad 383

———*Will, construction of—Self acquired properties, power of acquirer over—Words conferring absolute estate by subsequent terms held to confer only life estate—Devise, effect of, when devisees not in existence at testator's death*— Properties acquired by a Hindu, who had inherited no ancestral property, out of income derived by him in Government service are his self acquisition and he has complete power of disposition over them by will or otherwise to the prejudice of his male issue Where some terms of a will apparently give an absolute interest, but subsequent provisions show that only a life interest was intended to be given, effect will be given to the intention of the testator by cutting down the effect of the former words and construing them as conferring a life estate only When in making a provision for his sons, the testator uses words which, if strictly construed, would give them only a right to be maintained out of the income of certain moveable and immoveable properties, but subsequent portions of the will referred to them as 'donees' and directed such properties to be handed to them on coming of age —*Held*, that the sons were given a life interest in such properties. Where a testator after giving a life interest in certain properties to his sons devised the residue 'in favour of the male issue of the sons, such issue failing, in favour of female issue and that again failing, in favour of the grand-daughters by his daughter' and where at the testator's death, there were no grand children by his sons, but one of his daughters had two daughters alive: —*Held*, that the sons did not take the residue as on an intestacy, but that it was taken by the two daughters of the daughter, who were then alive SOMASUNDARA MUDALIAR v GANGA BISSEY SONI (1905)

I L R 28 Mad 386

HINDU LAW—WILL—*continued*

———*Ancestral property—Trust by the father—Trust Act (II of 1882), s 6—Will—Executors—Legatees*—A Hindu, who had a son living jointly with him, made a will whereby he appointed his son as heir to his whole property, which was ancestral, and also appointed trustees in order to administer the property, until his son should attain 21 years. The trustees were empowered to take the whole of the property into their possession *Held*, that the appointment of trustees was void since at the moment of the testator's death the whole of the property became the property of the son *Held* further, that no trust was created by the will because the property in question was not one transferable to the beneficiary Certain legacies were devised by the will to relatives of the testator and others *Held*, that as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI v BAI MANI (1905) . . I. L. R. 29 Bom. 351

———*Will—Construction—Authority to adopt—Bequest to adopted son—Authority to adopt declared invalid—Gift over to daughters—Testacy or intestacy—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Preferential right to inherit—Meaning of "to whom and whose respective sons I give devise and bequeath the same" —Limitation, words of—Whether the suit defective for want of a general administrator.*—A testator by his Will authorised an adoption in a manner which in a suit brought by the adopted son was held to be invalid under Hindu Law By the same Will he further directed "his executors and executrix and trustees to pay out of the income and interest of his estate and effects monthly" certain expenses "and invest the rest and residue . in Government securities" . . . . . and he declared that "in no case was such adopted son to have or exercise any control or dominion over his estate and effects until the death of his wife" after which event the executors and trustees were directed "to make over the whole of the estate and effects . . . . . to such adopted son . . to whom and his heirs he bequeathed the same" *Held*, that this amounted to a present bequest to the adopted son accompanied by directions to accumulate and restraints on enjoyment and possession both of which would probably be held to be invalid beyond the date of majority of the adopted son The Will further directed that "in case none of such adopted sons surviving his wife or . . surviving his wife and dying under the age of 18 years without leaving a son or sons, his executors should make over and divide the whole of his estate both real and personal unto and between his daughters in equal shares to whom and their respective sons he bequeathed the same" *Held*, that this was a valid gift over to the testator's daughters; and that the gift to the adopted son having failed the daughters became entitled to the estate absolutely and in equal shares, the words "and their irrespective sons" in the above clause being words of limitation and not of purchase. A

HINDU LAW—WILL—*continued.*

preliminary objection, *viz.*, that the suit was defective for want of a party representing the estate of the testator, was overruled as all the parties, who could by any possibility have an interest in the estate, were already before the Court and the plaint asked for administration only in case such relief were deemed necessary and the Court in this case did not deem it to be necessary. RANEEMONEY DASSEE *v.* PREMMONEY DASSEE (1905).

9 C. W. N. 1033

——— *Construction of will—Gift over—Defasance—Vesting of corpus in abeyance—Executors and trustees, position of—Adoption—Adoption of sons in succession.*—Whereunder the terms of a will the corpus of the estate was not to vest, until the happening of a certain event, it would in the meantime vest in the heir, and on the death of the heir (intestate) it would devolve on his heir. Executors and trustees of Hindu wills executed before the 1st September 1870 are merely managers and no estate vested in them. *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu, I. L. R. 25 Calc. 103,* followed. A clause of defeasance in order to be operative must contain express words of necessary implication of a gift over to a definite person. The implication of a gift over to a second adopted son, who may never be adopted, cannot prevent the widow of the first adopted son from inheriting the share taken by the latter. Where a Hindu gave authority to his widow to adopt sons to him in succession, her power to adopt a second son would terminate on the first adopted son dying leaving a widow in whom the estate became vested. *Bhoobunmoyee Debia* v. *Ramkishore Acharj Chowdhry, 10 M. I. A. 279 : 3 W. R. (P. C.); Padma Kumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302; Keshav Ram Krishna* v. *Govind Ganesh, I. L. R. 9 Bom. 94; Thayammal* v. *Venkatarama, I. L. R. 10 Mad. 205 : L. R. 14 I. A. 67,* and *Tara Churn Chatterji* v. *Suresh Chunder Mukerji, I. L. R. 7 Calc. 122,* followed. AMULYA CHARAN SEN *v.* KALI DAS SEN (1905).

I. L. R. 32 Calc. 861

——— *Construction of will—Bequest to a class—Unborn person—Primary and secondary intentions.*—There is no rule of Hindu Law to the effect that a gift *inter vivos* or a bequest to a class of persons some of whom are incapable of taking by reason of the rule that a gift is valid only, if it is made to a sentient being capable of taking, is void also as regards those who are in existence and capable of taking. The analogy of the rule of English law laid down in *Leake* v. *Robinson, 2 Mer. 363 : 16 R. R. 169,* in connection with class-gifts infringing the rule against remoteness does not hold good. Where a bequest to a class does not offend against the rule as to perpetuities, the only question is, what was the primary and what the secondary intention of the testator. In the case of a gift to a class consisting of children or descendants, some of whom cannot take, the testator may be considered to have a primary and a secondary intention; his primary intention is that all members shall take and his secondary intention is that, if all cannot take, those who can shall do so, and the general rule is that those members of the class take who are capable of taking at the death of the testator. *In re Coleman and Jarrom, 4 Ch. D. 165,* referred to. Where after giving prior life estates the testator bequeathed his properties to his sisters' sons, "that is to say, their sons, who are now in existence as also those who may be born hereafter" in equal shares: *Held,* that the secondary intention of the testator as deducible from the several clauses of the will was that at least those of the sisters' sons, who were in existence at the time of his death, though not specifically named, would take and such intention should be carried out. *Rai Bishen Chand* v. *Asmaida Koer, I. L. R. 6 All. 560 : L. R. 11 I. A. 164; Hurdey Narain* v. *Rooder Perkash, L. R. 11 I. A. 26; Ram Lal Set* v. *Kanai Lal Seit, I. L. R. 12 Calc. 663; Srinivasa* v. *Dandayudapani, I. L. R. 12 Mad. 411; Rai Kishori Dasi* v. *Dabendra Nath Sircar, I. L. R. 15 Calc. 409; Bhoba Tarini Debi* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 616; Manjamma* v. *Padmanabhayya, I. L. R. 12 Mad. 393; Mangaldas Parmanandas* v. *Tribhuvandas Narsidas, I. L. R. 15 Bom. 652; Tribhuvandas Ruttonji Mody* v. *Gangadas Tricumji, I. L. R. 18 Bom. 7; Krishnarao Ram Chandra* v. *Benabai, I. L. R. 20 Bom. 571; Khimji Jairam Narronji* v. *Mararji Jairam Narronji, I. L. R. 22 Bom. 536; Gordhandas Soonderdas* v. *Bai Ramcoover, I. L. R. 20 Bom. 449; Advocate General* v. *Karmali Rahimbhai, I. L. R. 29 Bom. 433; In re Moseley's Trusts, 11 Ch. D. 555;* and *Pearks* v. *Moseley, 5 App. Cas. 714;* referred to. *Rajomoee Dassee* v. *Troylukho Mohiney Dassee, I. L. R. 29 Calc. 260,* not followed. BHAGABATI BARMANYA *v.* KALI CHARAN SINGH (1905).

I. L. R. 32 Calc. 932
s.c. 9 C. W. N. 749

——— *Will—Devise—Nature of estate devised—No presumption that it is of limited extent only.*—Where a Hindu gave by will all his property, moveable and immoveable, to his mother with a direction to her to feed and clothe his widow so long as she should remain under her control: *Held,* that such a gift did not confer a less estate on the mother than would have been conferred had she been a male, *i.e.*, an absolute estate, and that a bequest by the donee herself by will of all the properties so bequeathed was a good and valid bequest. In Hindu law there is no presumption that a gift to a mother as such confers a limited estate only. Such a presumption exists only in the case of a gift or devise of immoveable property to the wife. *Mahomed Shamsul Huda* v. *Shewukram, L. R. 2 I. A. 7,* and *Annaji Dattatraya* v. *Chandrabi, I. L. R. 17 Bom. 503,* distinguished and explained; *Mussumut Kollany Koer* v. *Luchmee Persad, 24 W. R. 395,* and *Bhoba Tarini Debya* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 616,* followed. ATUL KRISHNA SIRCAR *v.* SANYASI CHURN SIRCAR AND ANOTHER (1905) . . I. L. R. 32 Calc. 1051
s.c. 9 C. W. N. 781

——— *Will of a Hindu—Construction, principles of—Persons designate—Adoption a condition*

HINDU LAW—WILL—*concluded*

precedent to taking—Wife, bequest to—Hindu law, provisions of, and Hindu notions to be kept in mind—Election—Estoppel as against person in possession—Held, on the construction of a Will, under which a person claimed properties left by the testator as a *persona designata* to whom he alleged they were specifically bequeathed, that the testator assumed as a basis of his deposition that there was to be an adoption of that person as his son, and that that was the essential condition on which the bequest to him was made. The principles of construction deducible from the authorities are (1) That the decision in each case of this nature must depend on the terms of the testamentary documents, which are in question. (2) That the provisions of the Hindu law are to be kept in mind in endeavouring to carry out the intentions of the testator and that it is not safe to apply the English principles against holding conditions to be conditions precedent in such cases; and (3) That if on an interpretation of the document it appears that the intention of the testator was that the fulfilment of a certain qualification was a condition precedent to the bequest taking effect, then the legatee cannot take the bequest, unless the condition be fulfilled. But if it appears that it was the intention of the testator that the legatee should take the bequest irrespective of the condition and the bequest was made to the legatee specifically, then the bequest will take effect even though the condition be not fulfilled. The bequest to the testator's *wife* was held in this case to confer on her a life-interest only. *Mahomed Shumsool v Shewakram, L. R 2 I. A. 7*, applied. A person, who elected to take a legacy under the Will, was estopped from setting up a title contrary to its provisions. But when the party sought to be estopped was in possession the person asserting such estoppel could not succeed without proving his own title. PRONOOR LAL KUNDU v HARISH CHUNDRA DEY (1905).
9 C. W. N. 209

———— *Unregistered memorandum of an oral gift—Subsequent disposal by will—Presumption of advancement—Indian Trusts Act (II of 1882), s 82—Transfer of Property Act (IV of 1882), s 123—Hindu Law*—A Hindu widow brought a suit against the executor of her husband's will for a declaration that she was the sole owner of a house, which was purchased in her name by her husband and which was subsequently otherwise disposed of by her husband in his will. *Held*, that the plaintiff had not established her title to the house and that the disposal by will was valid. BAI MOTIVAHOO v PURSHOTAM DAYAL (1905)
I. L. R. 29 Bom. 306

HINDU WIDOW'S RE-MARRIAGE ACT (XV OF 1856).

———— s. 2—*Hindu widow, re-marriage of—Effect of re-marriage on rights of inheritance accruing after such re-marriage*—The right of a Hindu widow, who re-marries during the lifetime of her son, to succeed by inheritance to the ancestral property of such son on his death, is not within any

HINDU WIDOW'S RE-MARRIAGE ACT (XV OF 1856)—*continued*

of the exceptions referred to in s. 2 of Act XV of 1856, and she is entitled to succeed notwithstanding her re-marriage. *Chunni Ram v Kashi, I L. R. 26 Bom 388*, referred to and followed. LAKSHMANA SASIMALLA v SIVA SASIMALLAYAN (1905) . . . . I. L. R. 28 Mad. 425

HOMESTEAD LAND.

See BENGAL TENANCY ACT.

HUNDI.

———— *Stolen hundi—Payment by drawee to wrong person—Conversion—Measure of damages*—A drawee of a *hundi* negligently paying to a wrong person is liable for conversion and the measure of damages payable to the lawful owner is the full amount of the *hundi*. *Ganesh Das Ram Narayan v Lachminarayan, I L. R 18 Bom. 670; Klenwort Sons & Co v Comptoir National D'Escompte De Paris, L. R 2 Q B 157*, followed. SAHU LALTA PERSHAD v MCLEOD (1905)
9 C. W. N. 811

HYPOTHECATION.

See MORTGAGE

I

IDOL.

See CIVIL PROCEDURE CODE

See LIMITATION I. L. R. 32 Calc. 129

ILLEGAL GRATIFICATION.

See PENAL CODE, s. 161.
9 C. W. N. 547

———— *Penal Code (Act XLV of 1860), s 161—Demand of duties by Civil Court peon*—A demand of *duties* by a Civil Court peon from the plaintiff, as a motive or reward for serving the summonses on his witnesses without an identifier, amounts to an attempt to obtain an illegal gratification within s. 161 of the Penal Code. *Empress of India v Baldeo Sahai, I. L. R 3 All 253*, followed. *Queen-Empress v. Ramakka, I L. R 6 Mad. 5*, distinguished. RATAN MONI DEY v. EMPEROR (1905).
I. L. R 32 Calc. 292
s.c. 9 C. W. N. 547

IMMOVEABLE PROPERTY

See DOMICILE I. L. R. 32 Calc. 631

See JURISDICTION I. L. R 32 Calc 602

See LETTERS PATENT

See LIMITATION . I. L. R. 32 Calc. 459

See LIMITATION ACT, SS. 3 AND 17.
I. L. R. 27 All. 462

IMPARTIBLE ESTATE.

See HINDU LAW. I. L. R. 27 All. 203

IMPROVEMENTS.

See LANDLORD AND TENANT.
I. L. R. 29 Bom. 580

——— *Calingula constructed by Government —Necessary effect to cause water to flood plaintiff's lands—Rights of Government in connection with the distribution of water—Limitation Act (XV of 1877), s 24—Continuing wrong.*—In 1882 a calingula was constructed by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the calingula be blocked up. *Held*, that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public, subject to the rights of a ryotwari land holder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements. But the rights of Government, in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work, which has this effect, is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the calingula was necessary for the protection of the tank, and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected. Even if Government had been empowered by statute to construct the calingula in question, it would be for Government to show that they could not exercise their statutory powers without injuring the plaintiffs' lands. The position of persons acting under statutory authority discussed. *Held, also*, that the injury was a continuing one and that the suit was governed by s. 24 of the Limitation Act and was not barred by limitation. SANKARAYADIVELU PILLAI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1905).
I. L. R. 28 Mad. 72

——— *Water-course—Construction of new channel—Prior to construction water flowed naturally or percolated without definite course—Material alteration.*—Plaintiff sued for an injunction to restrain defendant from making or using a water channel. Prior to the construction of the channel, all the water that flowed from the defendant's land on to the plaintiff's found its way there by natural flow or percolation and was not carried down by any definite water-course. The effect of the channel was to collect water, which formerly flowed from a large tract of land at different points in a definite channel and to throw it all into a particular part of the plaintiff's channel. *Held*, that plaintiff was entitled to the relief sought. Even though no greater quantity of water might eventually be carried into plaintiff's channel than had hitherto run into it, the new channel effected a material alteration in the mode of the passage of the water from the defendant's land into that of the plaintiff. Such a change plaintiff was entitled to object to. VENKATAGIRI *v.* MUDDUKRISHNA (1905)
I. L. R. 28 Mad. 15

INAMDAR.

See ENDOWMENT.

See ENHANCEMENT OF RENT.

See FOREST LANDS.

See GRANTS.

See LAND REVENUE CODE.

——— *Land Revenue Code (Bombay Act V of 1879), s. 83—Grantee of Royal share of revenue or of soil—Mirasi tenant—Enhancement of rent —Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable.* —A grant to an Inamdar may be either of the Royal share of revenue or of the soil; but ordinarily it is of the former description and the burden rests on the Inamdar to show that he is an alienee of the soil. Where an Inamdar is alienee only of the land revenue, then his relations towards those, who hold land within the area of the Inam grant, vary according to certain well-recognized principles. If the holding was created prior to the grant of the Inam, then the Inamdar as such can only claim land-revenue or assessment; for he has no interest in the soil in respect of which rent would be paid; but if the holding be later in its origin than the Inam grant, then the lands comprised in such holding would be the Sheri lands of the Inamdar and he would be entitled to place tenants in possession of them, even if only a grantee of revenue. With respect to the latter class of holding, direct contractual relations would be established between the Inamdar and the holder. If no such contract can be proved, recourse must be had to s. 83 of the Land Revenue Code (Bombay Act V of 1879). In the absence of satisfactory evidence of agreement, the rent is that payable by the usage of the locality and failing that, such rent as, having regard to all the circumstances of the case, shall be just and reasonable. In a suit by an Inamdar to enhance rent of Miras land, it must be determined whether what was paid was rent and whether the Inamdar has a right to enhance as against one, who holds on the same terms as the defendant does; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR (1905).
I. L. R. 29 Bom. 415

INCUMBRANCES.

See EVIDENCE . I. L. R. 32 Calc. 710

See SALE FOR ARREARS OF RENT
I. L. R. 32 Calc 911

See SALE FOR ARREARS OF REVENUE
I. L. R. 33 Calc. 27

INDICTMENT.

See CHARGE, ADDITION TO OR ALTERATION OF . I. L. R. 32 Calc. 22

INJUNCTION.

See BENGAL TENANCY ACT, s 22
9 C. W. N. 249

See CIVIL PROCEDURE CODE, s 584.
I L. R 27 All. 684

See COURT FEES ACT, s 7.
9 C. W. N. 690

See EASEMENT

See INSOLVENCY . 9 C W. N 221

See LANDLORD AND TENANT

See LIMITATION ACT, s 42
I. L. R. 27 All. 406

See MAINTENANCE 9 C. W. N 1073

See NUISANCE 9 C. W N. 612
I. L. R. 32 Calc. 697

See SPECIFIC RELIEF ACT, s 54
9 C. W. N. 87

See TRADE MARK. I. L. R. 32 Calc 401

——— *Light and air—Obstruction—Occupation uncomfortable—Rule of 45°—Decree*—In a suit for an injunction to restrain the defendant from obstructing the access of light and air to the plaintiff's windows the first Court granted an injunction solely on the ground that the defendant's new building left the plaintiff with less than 45° of light, and dispensed with any further evidence On appeal the lower Appellate Court reversed the decree on the ground that no evidence had been adduced to show that there was a diminution of light. *Held*, that both the lower Courts were in error and that the case must be remanded for the determination of the following issues:—(1) Has there been a diminution in the quantity of light and air which has been accustomed to enter the windows of the plaintiff's house during the whole of the prescriptive period? (2) If so, has there been a privation of light and air sufficient to render occupation of the house uncomfortable? CHOTALAL MOHANLAL v LALLUBHAI SURCHAND (1905)
I. L. R. 29 Bom. 157

INSOLVENCY.

See PRE EMPTION . I. L. R. 27 All. 1

——— *Insolvency—Application for ad interim protection—Practice*—In applications for *ad interim* protection, the practice is to postpone the grounds of opposition, until the hearing, unless the ground imputes fraud or bad faith in respect of the opposing creditor's particular claim. IN THE MATTER OF DINENDRA NATH MULLICK (1905)
9 C W. N. 221

——— *Insolvency jurisdiction of the High Court—Order of Insolvency Court, if judgment of High Court—Suit on order for costs awarded by Insolvency Court if maintainable—Civil Procedure Code (Act XIV of 1882), s. 244—Limitation Act (XV of 1877), Sch II, Art 122—Interest*—An order of the High Court in the exercise of its insolvency jurisdiction is a judgment of the High Court and a suit based upon such order is maintainable. *In the matter of Candas Narrondas (Naviraln v C. A Turner), L R 16 I A. 156: s c I L. R 13 Bom. 620*; and *Attermony Dossee v Hurry Doss Dutt, I L. R 7 Calc 74: s c 9 C. L. R. 357*, referred to Such a suit is governed by Art. 122, Sch. II of the Limitation Act. The plaintiff sued to recover the amount of costs due under an allocatur issued by the Registrar of this Court on the 7th of September 1902 in respect of certain costs ordered by this Court in its insolvency jurisdiction on the 1st of June 1892. The order did not provide for payment of interest *Held*, that the plaintiff was not entitled to interest on the amount. ANNODA PRASAD BANERJEE v NOBO KISSORE ROY (1905)
9 C W. N. 952

INSOLVENT

——— *Insolvency of judgment-debtor—Receiver appointed, but no order of discharge—Application by creditor to execute decree by arrest of insolvent—Maintainability—S* applied to the Court of a District Munsiff to be declared an insolvent. After notice to his creditors, amongst whom was the present petitioner, the holder of a decree against *S* the District Munsif passed an order declaring *S* insolvent. A receiver was appointed to take charge of the insolvent's properties and he was put in possession of all of them excepting two items, one of which was not included in the schedule. The receiver realised assets and made distributions among the creditors entitled, but no order was passed by the Court either discharging or refusing to discharge the insolvent. The present petitioner then applied to the Court for the arrest of the insolvent in execution of his decree:—*Held*, that in the circumstances the insolvent could not be arrested. If an insolvent prevents the receiver from obtaining possession of his properties or if it subsequently transpires that he has committed some act of bad faith, then the Court may refuse his discharge, under s 355 of the Code of Civil Procedure *Semble*, that in such a case it might be open to creditors to apply to execute their decrees. PANUGUPALLI SEETHARAMAYA v NANDURI RAMACHENDRUDU (1905) . I. L. R. 28 Mad. 153

INSOLVENT ACT (11 AND 12 VICT., C. 21).

———— s. 7—*Attachment under garnishee order—Debt in hands of Sheriff—Rights of Official Assignee as against attaching creditor.*—*N*, on an attachment under a garnishee order, handed over R1,200, a sum largely exceeding the amount due by him to the judgment-debtor, together with R83-9-0, the costs of the execution, to the Sheriff. On the following day, the judgment-debtor filed his petition in the Insolvent Court. Upon the Official Assignee claiming R399-12-9, that portion of the sum in the hands of the Sheriff, which was admittedly owing to the attaching creditor; *Held*, the title of the Official Assignee must prevail. The payment to the Sheriff could not be treated as equivalent to a payment to the creditor. It was really tantamount to a payment into Court. The fact that a larger sum was paid to the Sheriff, than was actually owing, showed that such payment was made for the purpose of getting rid of the attachment, and not in satisfaction of the debt. The property in the hands of the Sheriff must still be considered as belonging to the insolvent, and therefore as being vested in the Official Assignee. *Frederick Peacock* v. *Madan Gopal, I. L. R. 29 Calc. 428*, and *Krisnasawmy Mudaliar* v. *Official Assignee of Madras, I. L. R. 26 Mad. 673*, followed; *Ex parte Pillras, In re Curtoys, 17 Ch. D. 653*, referred to. JITMAND *v.* RAMCHAND (1905) . . . I. L. R. 29 Bom. 405

———— s. 86—*Entering of judgment against insolvent.*—*Semble* that there is no provision in the Insolvency Act of 1848, which imposes upon an insolvent, who has obtained his personal discharge, the duty of disclosing to the Official Assignee that he has become possessed of property since the making of the order of personal discharge, consequently the non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or the Official Assignee so as to render s. 18 of the Limitation Act applicable. S. 86 of the Insolvency Act is permissive and provides that the Court may enter up judgment against an insolvent, if in the circumstances of the case it shall think fit. *Semble*, therefore, that following the rule of practice under the English Bankruptcy Acts judgment will not be entered up against a bankrupt as a condition of his discharge, unless he has an income more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life. ABDUL KAREEM SAHIB *v.* OFFICIAL ASSIGNEE OF MADRAS (19 5).
I. L. R. 28 Mad. 168

INSURANCE.

See MARINE INSURANCE.
I. L. R. 29 Bom. 360

———— *Insurable interest—Property in goods, passing of—Contract Act (IX of 1872), s. 78—Ascertained goods—Postponement of passing of property by agreement.*—If the parties to a contract for the sale of ascertained goods agree that the payment for and delivery of the goods are to be

INSURANCE—*concluded.*

postponed, the property in the goods passes to the buyer as soon as the proposal for sale is accepted, and such passing of property cannot be put off by any agreement between the parties. *Per* MACLEAN, *C. J.*—If in a contract there appear certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue. In the present case all the elements necessary for a completed sale, such as to pass the property to the buyer exist, and there is no manifestation of any intention to postpone the passing of the property. The buyer has therefore an insurable interest in the goods. But where the sale is of unascertained goods and there has been no subsequent ascertainment or appropriation, then there has been no effective sale so as to pass the property in the goods to the buyer and he has no insurable interest. BRIJ COOMAREE *v.* SALAMANDER FIRE INSURANCE COMPANY (1905).
I. L. R. 32 Calc. 816

INTEREST.

See BANKER AND CUSTOMER.
9 C. W. N. 745

See BENGAL TENANCY ACT, s. 67.
9 C. W. N. 175

See CIVIL PROCEDURE CODE.
9 C. W. N. 421, 460, 1064

See HATH-CHITTA . 9 C. W. N. 693

See INSOLVENCY . 9 C. W. N. 952

———— *Bengal Tenancy Act (VIII of 1885), s. 67—Kabuliat, rate of interest mentioned in—Purchaser at auction sale, liability of, to pay interest.*—A purchased at an auction sale in execution of a rent decree a tenure covered by a *kabuliat*, which stipulated for interest at a specified rate:—*Held*, that the tenure being subsisting, *A* bought the tenure subject to the terms and conditions of the lease, and was liable for interest at the rate mentioned in the *kabuliat*, and not at the rate mentioned in s. 67 of the Bengal Tenancy Act. LAL GOPAL DUTT CHOWDHRY *v.* MANMATHA LAL DUTT CHOWDHRY (1905) . I. L. R. 32 Calc. 258

IRRIGATION.

See RIPARIAN OWNER.

J

JAINS.

See HINDU LAW.

JALKAR.

———— *Fishery, right of—Change in course of river.*—Where it was found that a piece of water in dispute, which was at one time a part of the bed of the river Ganges, was still connected with it, although the connection might dry up in the hot weather, *Held*, following earlier authorities, that

JALKAR—*concluded*

the disputed water having been part of the bed of the Ganges and the two being connected the plaintiff, who had fishing rights in the adjacent Ganges, was entitled to the fishing rights in the said water JOGENDRA NARAYAN ROY v CRAWFORD (1905) I L. R. 32 Calc 1141

JOINDER OF CHARGES

See CRIMINAL PROCEDURE CODE

JOINT FAMILY

See HINDU LAW I L. R 27 All. 16
I L. R. 29 Bom 51

See LANDLORD AND TENANT I. L. R 32 Calc 567

JOINT PROPERTY

See COURT FEES ACT I L R 29 Bom. 16

See HINDU LAW

——— *Dispossession of some of the co owners by others—Suit for recovery of joint possession—Form of decree*—Where certain of the co-owners of immoveable property had been prevented by some of the other co owners from exercising their legal rights in respect of the joint property, it was *held* that the dispossessed co-owners were entitled to a decree that they should be restored to joint possession of the joint property, and not merely to a decree declaring their right to joint possession. *Bhairon Rai v Saran Rai Weekly Notes, 1904, p 106* followed. *Watson & Co v Ramchund Dutt, I L R 18 Calc 10* and *Rahman Chaudhri v Salamat Chaudhri, Weekly Notes, 1901, p 48*, referred to RAM CHARAN RAI v KAULESHAR RAI (1905) I. L. R. 27 All. 153

——— *Exclusive dealing with joint property by one of the co-owners—Remedy of the other co-owners—Form of decree*—Upon the death of the tenant of land, which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself The remaining co-sharers brought a suit to recover possession—apparently actual physical possession—of three-quarters of the tenant's holding thus occupied by the defendants. *Held* that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in dispute, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land *Bhola Nath v Baikin, Weekly Notes 1894 p 107, Ram Jatan Shukul v Jassar Shukul Weekly Notes, 1894 p 166*, and *Rahman Chaudhri v Salamat Chaudhri, Weekly Notes, 1901 p 48*, referred to *Bhairon Rai v Saran Rai, I L R 26 All 588*, distinguished JAGAR NATH SINGH v JAI NATH SINGH (1905) . . . I. L. R. 27 All. 88

JOINT TRIAL.

See CRIMINAL PROCEDURE CODE

JUDICIAL PROCEEDING.

See CRIMINAL PROCEDURE CODE ss 195, 364 AND 476 . 9 C W. N. 1030

See LAND ACQUISITION ACT I. L. R. 32 Calc 605

See PENAL CODE ss 191 AND 193, CL. (2). 9 C. W. N. 127

——— *Offence in the course of—Resistance to delivery of possession—Criminal Procedure Code (Act V of 1898), ss 4 (m), 476—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s 329.*—Where in an execution case a warrant for the delivery of possession of lands was entrusted for execution to the Nazir, who went to the spot, but was obstructed by the opposite party to the suit, and on his reporting the matter, the Munsif held an enquiry under s. 476 of the Criminal Procedure Code and sent the accused to the Magistrate for trial under s 186 of the Penal Code *Held*, that the "judicial proceeding" in the case determined when the Munsif finally decided the case, there being no further question left for determination as to the rights of the parties to the suit upon which evidence could have been legally taken, that the obstruction was not therefore brought to the notice of the Munsif in the course of a "judicial proceeding," and that he had no jurisdiction under s 476 of the Criminal Procedure Code to hold an inquiry HARA CHARAN MOOKERJEE v EMPEROR (1905) I. L. R. 32 Calc 367 s c. 9 C W. N. 364

——— *'Judicial proceeding'—Local enquiry, not authorised by law—Custody of female child—Rival claim of husband and mother—Question for Civil Court—Proceeding before Deputy Magistrate—Order for prosecution for perjury by District Magistrate*—An application was made before the District Magistrate on behalf of a mother for the recovery of the custody of a female child from her grandfather *G*, who was thereupon called upon by a Magistrate to show cause *G* declared before the Deputy Magistrate that the child had been already married to *R* The Deputy Magistrate examined *R* and *G* and having satisfied himself that the marriage had actually taken place, submitted the case for orders before the District Magistrate, who dismissed the application The District Magistrate upon a subsequent application, in which the story of the marriage was challenged as false held a local inquiry and came to the conclusion that *G* and *R* had given false evidence before the Deputy Magistrate and ordered their prosecution for perjury *Held*, that the alleged offence of perjury had not been brought to the notice of the District Magistrate in a "judicial proceeding" within the meaning of s 476 of the Code of Criminal Procedure, and the order for prosecution was made without jurisdiction. The local inquiry held by him was one which in the circumstances of the case he was not authorised by law to make. Questions as to legal

JUDICIAL PROCEEDING—*concluded.*

guardianship should be determined by the Civil Court. *Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 98,* distinguished. GODAI SHAHA *v.* EMPEROR (1905) . . . 9 C. W. N. 1030

JUDGMENT-DEBTOR.

See CIVIL PROCEDURE CODE.

JURISDICTION.

——— Irregularity—Interference in revision—

See CIVIL PROCEDURE CODE, s. 285. I. L. R. 27 All. 56

See CRIMINAL PROCEDURE CODE, s. 145. 9 C. W. N. 1046

See CRIMINAL PROCEDURE CODE, ss. 37, 88 AND 89 . I. L. R. 27 All. 572

See CRIMINAL PROCEDURE CODE, ss. 443, *et seq.* . . I. L. R. 27 All. 397

——— s. 556. I. L. R. 27 All. 25, 33

See EXECUTION OF DECREE. I. L. R. 27 All. 62

See LIMITATION ACT (I OF 1877), SCH. II, ART. 28 . . I. L. R. 27 All. 622

See OFFENCE . . 9 C. W. N. 816

——— (Civil and Revenue Courts)—

See ADEN COURTS ACT. I. L. R. 29 Bom. 368

See CIVIL COURT. I. L. R. 32 Calc. 1072

See CIVIL PROCEDURE CODE, s. 204. 9 C. W. N. 61

See CIVIL PROCEDURE CODE, s. 622. 9 C. W. N. 605

See CONTRACT . I. L. R. 32 Calc. 884

See COURT FEES ACT, s. 7. 9 C. W. N. 690

See CRIMINAL COURT. I. L. R. 32 Calc. 783

See DEFAMATION I. L. R. 32 Calc. 425

See EXECUTION . . 9 C. W. N. 381

See FOREST ACT. I. L. R. 29 Bom. 480

See GOVERNOR IN COUNCIL. 9 C. W. N. 257

See HIGH COURT . 9 C. W. N. 961

See INDIAN POST OFFICE ACT (VI OF 1898), s. 34.

See INSOLVENCY . 9 C. W. N. 952

See JUDICIAL PROCEEDING, OFFENCE IN THE COURSE OF I. L. R. 32 Calc. 367

See LETTERS PATENT.

JURISDICTION—*continued.*

See LIMITATION . 9 C. W. N. 958

See REMAND . I. L. R. 32 Calc. 1069

See REVENUE SALE. I. L. R. 32 Calc. 229

See SALE . I. L. R. 32 Calc. 1104

See SANCTION FOR PROSECUTION. I. L. R. 32 Calc. 379

See SECURITY TO KEEP THE PEACE. I. L. R. 32 Calc. 948

——— *Partition of portion of revenue-paying estate in Assam—Imperfect partition—Assam Land and Revenue Regulation (I of 1886), ss. 96, 154.*—The expression "imperfect partition," as defined in s. 96 of the Assam Land and Revenue Regulation, is referable to a division of the *entire* estate, and not of a portion of the estate. A suit for the partition of certain specific plots of land situated within a revenue-paying estate in Assam, the plaintiff having no joint interest in the other lands of the estate, is not covered by s. 154 of the Assam Land and Revenue Regulation, and is cognizable by the Civil Court. The Revenue authorities have no jurisdiction under the Regulation to make such a partition. *Abdul Khalik Ahmed* v. *Abdul Khaliq Chowdhri, I. L. R. 23 Calc. 514,* distinguished. *Held* by RAMPINI, J., *contra.* Such a suit is a suit for "imperfect partition" within the meaning of s. 96 of the Regulation and is not cognizable by the Civil Court, except as provided for in s. 154 (1) (*e*) of the Regulation. GODRI KRISHNA *v.* SARANUNDA SARMA (1905) . . I. L. R. 32 Calc. 1036

——— *Cause of action—Malicious prosecution—Letters Patent, cl 12—Leave—Liability of prosecutor, when prosecution ordered by Court.*—The plaintiff, a resident in British India, was charged with a criminal offence by the defendant in the Magistrate's Court at Rajkot. In order to secure his attendance the defendant moved the Bombay Government to initiate extradition proceedings against the plaintiff before the Chief Presidency Magistrate in Bombay who, however, held that a case for extradition had not been made out The plaintiff obtained leave from the High Court to file a suit against the defendant in Bombay for malicious prosecution. On an application by the defendant to have the leave rescinded: *Held,* that a material part of the cause of action accrued in Bombay and that the High Court had jurisdiction to entertain the suit. *Fitzjohn* v. *Mackinder, 9 C. B. N. S. 505, 528,* applied. MUSA YAKUB *v.* MANILAL (1905). I. L. R. 29 Bom. 368

——— *Civil Courts—Bombay Revenue Jurisdiction Act (X of 187 , as amended by Act XVI of 1877), s. 4.—Held,* that the effect of the amendment by Act XVI of 1877 is that nothing in s. 4 of the Bombay Revenue Jurisdiction Act (X of 1876) shall be held to prevent the Civil Courts in the Districts mentioned in the second schedule annexed to that Act from exercising jurisdiction over claims against Government to hold lands wholly or partially

JURISDICTION—*continued*

free from payment of land revenue. KALABHAI v THE SECRETARY OF STATE FOR INDIA (1905) I. L. R. 29 Bom. 192

——— *Civil Procedure Code (Act XIV of 1882), s 16, cl (d)—Suit for the determination of any right to or interest in immoveable property—Suit for the recovery of purchase money under contract for the sale of land.*—A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any right to or interest in immoveable property" within the meaning of s. 16 cl. (*d*) of the Code of Civil Procedure *John Young* v *Mangalapilly Ramaiya*, 3 *Mad H C* 125, and *His Highness Shrimant Maharaj Yashwant Rao Holkar* v *Dadabhai Cursetji Ashburner I L R 14 Bom 303*, referred to and distinguished. MATURI SUBBAYYA v KOTA KRISHNAYYA (1905) I L. R 28 Mad 227

——— *Jurisdiction of Civil Courts—Suit for declaration of right to recite text—Maintainability*—A suit is not cognizable in a Civil Court, where the subject of the plaintiffs' claim is confined to rights in religious ceremonies without a claim to any office or any emolument. A right to recite sacred texts in a temple is a matter of ritual of ceremony in a religious matter with which a Civil Court has nothing to do. SUBBARAYYA MUDALIAR v VEDANTACHARIAR (1905) I L R. 28 Mad. 23

——— *Letters Patent, cl 12—Suit for land—Leave of Court Cause of action—Title—Appeal from order discharging summons*—The plaintiffs asked for a declaration that they were entitled to exclusive possession and enjoyment of a *talao* situated outside the jurisdiction of the Court and that the defendants had no right in or to the same. They also sought an injunction to give effect to that declaration and further prayed that it might be declared that they were the exclusive owners of the *talao*. *Held* that the suit was a suit for land and that under the circumstances the Court had no jurisdiction to entertain it. *Held*, also, that an appeal lies from an order dismissing a Judge's summons to show cause why leave granted under cl. 12 of the Letters Patent should not be rescinded and the plaint taken off the file. *Hadjee Ismail Hadjee Hubbeeb* v *Hadjee Mahomed Hadjee Joosab*, 13 *B L R* 91, applied. Under s. 12 of the Letters Patent leave is only required, when the cause of action has arisen in part within the local limits of the ordinary original jurisdiction of the High Court; in every other case either the Court has no power to grant leave or it is unnecessary to obtain it. A Court of Equity in England only assumes jurisdiction in relation to land abroad, when as between the litigants or their predecessors some privity or relation is established on the ground of contract, trust or fraud, but in no case does a Court of Equity entertain a suit, even if the defendant is within the limits of its jurisdiction where the purpose is to obtain a declaration of title to foreign land. Though it is a general principle that the title to land should ordinarily be determined by the Court within the limits of whose jurisdiction it

JURISDICTION—*continued*

lies, it is, no doubt, open to the Legislature to disregard that principle. But the Courts certainly would not lean towards a construction involving that result, where the words of the Legislature are fairly capable of a meaning in conformity with the general principle. The phrase "suit for land" in s 12 of the Letters Patent is by no means limited to a suit for the recovery of land: the expression is not to be read with a technical limitation, which had never been associated with it. VAGHOJI KUVERJI v CAMAJI BOMANJI (1905) I. L. R. 29 Bom. 249

——— *Magistrate—Criminal Procedure Code (Act V of 1898), s 145 cls (1), (6)—Omission to record initiatory order—Arbitration, reference to.*—Where proceedings under s 107 of the Criminal Procedure Code were instituted against the parties and on their appearance the Magistrate, considering that the dispute came within s 145 of the Code, treated the case as one instituted under the latter section, and adjourned it for the evidence of their respective claims to actual possession, without recording an order under sub-s. (*1*)—*Held*, that the drawing up of a formal order under sub-s. (*1*) was absolutely necessary to the initiation of proceedings under s. 145 and the omission to do so rendered them bad for want of jurisdiction. S 145 does not contemplate that the question of actual possession should be delegated, even by the consent of the parties, to arbitration. It directs the Magistrate himself to receive the evidence produced by the parties, and to come to a decision in consideration thereof BANWARI LALL MUKERJEE v HRIDAY CHAKRAVARTI (1905) I. L. R. 32 Calc. 552

——— *Revenue Officer—Bengal Tenancy Amendment Act (Bengal Act III of 1898), s 9—"Every settlement of rent or decision of a dispute by a Revenue Officer"—Bengal Tenancy Act (VIII of 1885) ss 102, 104—Settlement Officer, jurisdiction of*—The words "every settlement of rent or decision of a dispute by a Revenue Officer" are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakhiraj* title under s. 104 of the Bengal Tenancy Act of 1885. RADHA KISHORE MANIKYA v DURGANATH BHUTTACHARJEE (1905) I. L. R 32 Calc. 162

——— *Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s 145—Parties—Manager—Title—Possession—Encroachment*—The fact that the manager, and not his employer, the zamindar, has been made a party to a proceeding under s 145 of the Criminal Procedure Code is a mere irregularity, or at most an error of law, which does not affect the Magistrate's jurisdiction. *Dhondhai Singh* v *Follet*, *I L R 31 Calc 48* referred to. Where a party claims no easement or customary right, any intermittent acts of encroachment on his part, such as cutting a few trees or filching some underwood, would not affect the title or possession of the superior landlord. *Framji Cursetji* v *Gouldas*

JURISDICTION—*continued.*

Madhowji, I. L. R. 16 Bom. 338; Agency Company v. *Short, L. R. 13 App. Cas. 793,* referred to. BHOLANATH SINGH *v.* WOOD (1905).
I. L. R. 32 Calc. 287

———*Jurisdiction of Magistrate—Dispute relating to a kutcherry—Initiatory order—Omission to state the grounds of the apprehension of a breach of the peace—Reference to information obtained in a local inquiry not recorded—Order as to costs—Criminal Procedure Code (Act V of 1898), ss. 145, cl. (1), 148.*—If the Magistrate omits in the initiatory order under s. 145, cl. (1) of the Criminal Procedure Code to state the grounds of his being satisfied as to the likelihood of a breach of the peace, the final order is without jurisdiction. Where, therefore, the initiatory order merely referred to some information, which was obtained during the course of a local inquiry held by himself, but had not been reduced into writing: *Held,* that the proceedings under s. 145 were bad in law. In a case initiated upon a police report or other information, which has been reduced into writing, reference can be made to the materials upon which the Magistrate acted, to ascertain whether there were in fact grounds upon which he might have acted, but even then it is his duty to state the grounds, upon which he was satisfied that there was a likelihood of a breach of the peace. *Queen-Empress* v. *Gobind Chandra Das, I. L. R. 20 Calc. 520; Dhanput Singh* v. *Chatterput Singh, I. L. R. 20 Calc. 513; Mohesh Sowar* v. *Narain Bag, I. L. R. 27 Calc. 981,* and *Jogomohan Pal* v. *Ram Kumar Gope, I. L. R. 28 Calc. 416,* referred to. NITTYANAND ROY *v.* PARESH NATH SEN (1905) . . . . I. L. R. 32 Calc. 771

———*Immoveable property, dispute as to—Bundh—Possession—Title—Costs—Damages—Criminal Procedure Code (Act V of 1898), ss. 145, 148.*—Proceedings under s. 145 of the Criminal Procedure Code were instituted with reference to a *bundh* erected by the second party upon land claimed both by the first and second parties. The Magistrate treated the case as if it were solely one of title and made an order directing the removal of the *bundh,* and he further awarded one of the parties R50 for the damage done to his crops as well as for costs in the case. *Held,* that the entire order was illegal and should be set aside, including the order as to costs. PRATAG MAHATON *v.* GOBIND MAHATON (1905).
I. L. R. 32 Calc. 602

———*Criminal Procedure Code (Act V of 1898), ss. 145, 146—Possession given by Civil Court—Practice.*—Where the petitioner had eight days before the institution of proceedings under s. 145 of the Criminal Procedure Code been put in possession of a portion of the disputed plots of land by the Civil Court in execution of a decree establishing his rights to the same. *Held,* it was the duty of the Magistrate in the proceedings under s. 145 of the Code of Criminal Procedure to find possession of the portion in accordance with the decree of the Civil Court. The order so far as it directs the attachment of the disputed land covered by that decree is without jurisdiction. GULRAJ MARWARI *v.* SHEIK BHATOO (1905) . . I. L. R. 32 Calc. 798

JURISDICTION—*concluded.*

———*Valuation of suit—Valuation for purposes of jurisdiction—Declaratory decree, suit for—Consequential relief—Court fees—Court Fees Act (VII of 1870), s. 7, para. 4, cls. (c), (d)—Suits Valuation Act (Act VII of 1887), s. 8.*—A suit by a plaintiff in possession for declaration of his title to land, and for an injunction restraining defendants from interfering with his possession by cutting trees thereon, and for damages falls within s. 7, para. IV, cls. (*c*) and (*d*) of the Court Fees Act. In such a suit the Court must accept the value of the relief stated in the plaint for the purposes of the Court-fees as well as for the purposes of jurisdiction. *Sardarsingji* v. *Ganpatsingji, I. L. R. 17 Bom. 56; Bai Varunda Lakshmi* v. *Bai Manegavri, I. L. R. 18 Bom. 207; Ostoche* v. *Hari Das, I. L. R. 2 All. 869; Jogal Kishor* v. *Tale Singh, I. L. R. 4 All. 320; Sheo Deni Ram* v. *Tulshi Ram, I. L. R. 15 All. 378; Valu Goundan* v. *Kumaravelu Goundan, I. L. R. 20 Mad. 289,* approved; *Kirty Churn Mitter* v. *Aunath Nath Deb, I. L. R. 8 Calc. 757,* and *Boidyo Nath Adya* v. *Makhan Lal Adya, I. L. R. 17 Calc. 680,* distinguished. HARI SANKER DUTT *v.* KALI KUMAR PATRA (1905).
I. L. R. 32 Calc. 734

JURY.

See CRIMINAL PROCEDURE CODE, S. 133.
9 C. W. N. 72

See PENAL CODE, SS. 114, 199 AND 466.
9 C. W. N. 69

See THUMB-IMPRESSIONS.
9 C. W. N. 520

K

KABULIAT.

See BENGAL TENANCY ACT.

See INTEREST.

See LANDLORD AND TENANT.

KEITIMA ADOPTION.

See BURMESE LAW. I. L. R. 32 Calc. 219

KHOJA MAHOMEDANS.

See WILL.

———*Marriage by Mahomedan rites—Succession and inheritance—Hindu Law—Widow—Maintenance.*—Although a Khoja and his wife are married according to Mahomedan rites, yet at the time of his death, so far as regards the succession of his property, he is a Hindu. If his brothers lived joint with him, his widow would be entitled to maintenance out of his estate, while his property devolved on them. According to Vyavahar Mayukh, which governs Khojas for the purpose of inheritance and succession, when a person inherits the estate of the deceased, he takes it as an *universitas* with all the rights and liabilities annexed to it. Maintenance of those whom the deceased was bound to maintain

KHOJA MAHOMEDANS—*concluded*

and payment of his debts are liabilities, which are annexed to the estate in the hands of those who take it. RASHID v SHERBANOO (1905) I. L. R. 29 Bom. 85

KHORPOSHDAR.

See GRANT

KIDNAPPING.

See PENAL CODE

KIDNAPPING FROM LAWFUL GUARDIANSHIP.

———*Mahomedan Law—Mahomedan minor, guardianship of—Preferential right of Mahomedan mother—Penal Code (Act XLV of 1860), ss 361, 363*—Under the Mahomedan law the mother is entitled to the custody of her daughter, in preference to the husband, until the girl attains the age of puberty The removal of an immature Mahomedan girl of eleven or twelve from the house of her mother in law, in whose charge the husband had left her, by a third person acting at the instance, and under the instigation of her mother is not a taking from "lawful guardianship," and does not amount to "kidnapping" *Nur Kadir* v *Zulekha Bibi*, *I. L. R 11 Calc 649*, referred to KORBAN v EMPEROR (1905) . I. L. R. 32 Calc 444

KULACHAR.

———of Darbhanga Raj

See GRANT FOR MAINTENANCE.
I. L. R. 32 Calc. 633
9 C. W. N. 567

L

LACHES.

See COURT SALE.

——— *Specific performance—Issues—Discretion of Court—Delay—Specific Relief Act (I of 1877), s 22—Purchase at Court-sale—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor—Held*, that laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. PEER MAHOMED v MAHOMED EBRAHIM (1905 I. L. R. 29 Bom. 234

LAMBARDAR AND CO SHARER.

See ADOPTION
See ADVERSE POSSESSION
See REGISTRATION ACT (III OF 1877)

LAND ACQUISITION ACT (I OF 1894)

See APPEAL . I. L. R. 32 Calc. 921
See BOMBAY IMPROVEMENT ACT
See COMPENSATION . 9 C. W. N. 655
See LAND ACQUISITION. I. L. R. 32 Calc 605
See VALUATION OF LAND I. L. R. 32 Calc. 343

——— ss 6, 11, 12 and 40—*Enquiry under s 40—Owner—Owner of land not entitled to notice of enquiry as to compensation—Judicial proceeding—Evidence on which award as to compensation may be based*—The owner of land, which it is proposed to acquire under the Land Acquisition Act (I of 1894), is not entitled to notice of the enquiry provided for by s 40 of the Act, which is in no sense a litigious proceeding The subsequent enquiry, by the Land Acquisition Collector, as to the value of the land and the amount of compensation to be paid for its acquisition, resulting in the award, is an administrative, and not a judicial proceeding, if the owner of the land desires a judicial ascertainment of the value of the land, he can require the matter to be referred by the Collector to the Court for determination In making his award the Collector is not limited to the evidence taken before him, but is entitled to avail himself of information supplied him without the knowledge of the owner of the land, and not disclosed at the enquiry EZRA v SECRETARY OF STATE FOR INDIA (1905) . I. L. R. 32 Calc. 605
s.c 9 C W. N. 454
L R. 32 I. A. 93

——— ss. 32, 33, 54—*Order—Order directing refund of compensation money paid—Civil Procedure Code (Act XIV of 1882), ss 254, 583, 649—Execution, mode of—Order directing payment of money*—An order made by a Court in a proceeding under the Land Acquisition Act, directing a party, to whom a sum of money awarded as compensation under the Act had been paid under a previous order, to refund the money, is not an award or a portion of an award within the meaning of s 54 of the Act, nor does it come under any of the orders mentioned in s. 588, of the Civil Procedure Code No appeal therefore lies from such an order *Sheo Ratan Roy* v *Mohri*, *I L R 21 All 354*, *Muhammad Ali Raja Avergal* v *Ahammed Ali Raja Avergal*, *I L R 25 Mad 237*, distinguished. The order directing a refund may be enforced by the imprisonment of the party against whom it is made or by the attachment and sale of his property under ss 254 and 649 of the Civil Procedure Code. NOBIN KALI DEBI v BINALATA DEBI (1905) . . I. L. R. 32 Calc 921

——— *Indian Forest Act (VII of 1871)—Distinction between the two Acts*—The most important distinction between the Land Acquisition Act (I of 1894) and the Indian Forest Act (VII of 1871) lies in this —that whereas in the Land Acquisition Act the Legislature has expressly constituted the Local Government the sole arbiter as to what land shall be acquired for a public purpose, the Indian Forest Act gives the power to afforest subject to

LAND ACQUISITION ACT (I OF 1894) —*concluded.*

conditions as to the fulfilment of which the Local Government is given no express power to decide. BALWANT RAMCHANDRA v. SECRETARY OF STATE (1905) . . . . I. L. R. 29 Bom. 480

LANDLORD AND TENANT.

	Col.
1. CROWN LANDS	201
2. CUSTOM	203
3. EASEMENT	204
4. EJECTMENT	205
5. ENHANCEMENT OF RENT . . .	207
6. FIXTURES	207
7. FORFEITURE	208
8. HOLDING OVER	209
9. HOMESTEAD	209
10. JOINT PROPERTY	209
11. LEASE	209
12. PRE-EMPTION	210
13. POSSESSION	212
14. RENT	212
15. MISCELLANEOUS	212

See APPEAL.
I. L. R. 32 Calc. 1023

See BENAMI TRANSACTION.

See DECREE.
I. L. R. 32 Calc. 680

See ENHANCEMENT OF RENT.
9 C. W. N. 303

See HOLDING OVER.
9 C. W. N. 340

See MORTGAGE LIEN.
I. L. R. 32 Calc. 41

See PARTITION.
9 C. W. N. 699

See PRESCRIPTION.
9 C. W. N. 293

1. CROWN LANDS.

———— *22 and 23 Vict., c. 41—Specific performance—Interests unknown to the law—Improvements—Equitable rights of tenant—Estoppel.* —In 1865, the Government of Bombay decided to construct an Eastern Boulevard in the City of Bombay. In accordance with this decision, a letter was addressed to the Municipal Commissioner, requesting him to remove certain fish and vegetable markets from the site of the proposed Boulevard. On the 17th November 1865, the Municipal Commissioner replied, that the markets were vested in the Corporation of Justices, but that he was willing to vacate certain Municipal stables, which occupied a portion of the proposed site, if the Government would

LANDLORD AND TENANT—*continued.*

1. CROWN LANDS—*continued.*

rent other land, mentioned in his letter, to the Municipality, at a nominal rent, the Municipality undertaking to bear the expense of levelling the same. The Municipal Commissioner by paragraph 8 of his letter requested permission to erect on such land "Stables of wood and iron with rubble foundations, to be removed at six months' notice, on other suitable ground being provided by Government." The land referred to by the Municipal Commissioner was Crown land, which vested in Her late Majesty by the operation of the Statute 21 and 22 Vict., c. 106. The Municipal Commissioner's application was referred to the Architectural Improvement Committee and on the 6th of December 1865, the Secretary to that Committee wrote as follows:—"The Committee see no objection to the ground applied for being rented to the Municipal Commissioner, and suggest that the annual charge of one pie per square yard be levied in consideration of the expense of filling in the ground." On the 9th of December 1865, the Government of Bombay passed the following Resolution:—"Government are pleased to sanction the application of the Municipal Commissioner for a site for stabling as expressed in paragraph 8 of his letter, on the terms proposed by the Architectural Improvement Committee in paragraph 1 of their letter." In 1866, the Municipal Commissioner entered into possession of the land; and stables, workshops and chawls were subsequently erected on the same, at considerable expense. On the 5th September 1890, a notice of the determination of the tenancy was served on the Municipal Commissioner, and he was requested to deliver up possession of the land within six months. Negotiations thereupon ensued for the grant by Government to the Municipality of a lease for 99 years, at a higher rent, but no agreement was arrived at. In 1897, rent was demanded from the Municipality, from the 1st April 1895, to the 31st March 1897, at the rate of R12,000 per annum, and the sum of R24,000 was at a subsequent date paid to Government under protest. In 1898, the Municipal Commissioner declined to pay rent at a higher rate than one pie per square yard. On the 6th June 1900, a further notice to quit was served on the Municipal Commissioner. On the 20th December 1901, the Secretary of State for India in Council filed a suit against the Municipal Corporation, praying, *inter alia*, for a declaration that the tenancy of the defendants created by the Government Resolution of the 9th December 1865, had determined, and for an order that the defendants should pay to the plaintiff arrears of rent, at the rate of R12,000 per annum, from the 1st April 1897. The defendants counterclaimed in respect of the R24,000 paid for rent, under protest, in 1897. The lower Court held, that the tenancy created by the Government Resolution of the 9th December 1865, had been determined by the notice to quit, dated the 6th June 1900, and ordered the defendants to pay to the plaintiff a sum, to be ascertained by the Special Commissioner, as compensation for holding over the land. The defendants' counterclaim was dismissed with costs. The defendants appealed. *Held* that, if the alleged disposition

LANDLORD AND TENANT—*continued.*

1 CROWN LANDS—*concluded.*

In 1865 purported to be a transfer of the right to enjoy the property neither for a certain time, nor in perpetuity, then it was an attempt to create, by lease, an interest unknown to the law and as such was bad. A disposition in 1865 of Crown lands by the Governor in Council was dependent for its validity on an adherence to the forms prescribed in 22 and 23 Vict., c. 41, and therefore the Resolution was not a valid disposition of the property for the interest claimed. The claim for specific performance was open to similar objections. A Court would not have granted specific performance of a contract for an interest not recognized by the law, and the Resolution regarded as a contract was equally open to the objection, that the statutory formalities had not been observed. *Held*, also, that the relief adequate to the requirements of the case lay in the direction of securing to the Municipality, on the one hand, an interest of considerable duration, and to the Government or the Crown, on the other, a reasonable rent. The Municipality, having, under an expectation created and encouraged by the Government that a certain interest would be granted, taken possession of the land with the consent of Government, and upon the faith of such promise or expectation and with the knowledge of and without objection by Government, laid out money upon the land, had an equitable right to have such expectation realised, and the Crown came within the range of that equity. Such equity differed essentially from the doctrine embodied in s. 115 of the Indian Evidence Act, which is not a rule of equity, but is a rule of evidence formulated and applied in Courts of law. It was not an objection to that equity, that the interest the Municipality was to have in the land, was not originally moulded in a form recognized by the law. *Held*, also, that the defendants' counterclaim was well founded and should be allowed. *Ramsden* v. *Dyson*, *L. R. 1 H. L. 129*, *170*, and *Plimmer* v. *The Mayor of Wellington*, *9 App. Cas. 699*, followed. MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE FOR INDIA (1905) . . I. L. R. 29 Bom. 580

2. CUSTOM.

——— *Accommodation provided in the abadi for agricultural tenant—Suit for ejectment*—Some agricultural tenants had been occupying a room in an enclosure in the *abadi* for thirty years. *Held*, on a suit by the zamindar to eject them that the plaintiff had no cause of action; either the defendants had acquired a title by adverse possession, or if their possession was permissive, they could not according to custom be ejected, while their tenancy was still undetermined. NAZIR HASSAN v. SHEDDA (1905) . . . . I. L. R. 27 All. 61

——— *Rights of land holder in the abadi—Transfer of house site by tenant*—Apart from any custom recorded in the *wajib ul arz* forbidding a tenant to transfer the site of a house occupied by him in the *abadi*, a tenant has not in the absence of a special custom or contract giving him such a right, any right to transfer the site of his house in the *abadi*. BHAJAN LAL v. ABDUS SAMAD KHAN (1905) I. L. R. 27 All. 55

——— *Customary law—Rights in respect of building sites in the abadi—Wajib-ul-arz—Unauthorized building—Acquiescence*—The plaintiff, who was the receiver of the estate of a minor, situate in the district of Bulandshahr, resided at Calcutta, the property in Bulandshahr being managed through a karinda, whose authority was strictly limited by a power-of-attorney. In 1894, two tenants of the village Sankhni, in which the minor was a co-sharer, sold their house in the *abadi* by means of a registered sale-deed. The vendee was put into possession, and proceeded, between 1894 and 1896, to spend a considerable sum of money in building a "pucca" house on the site of the house so purchased. It did not appear that he made any inquiries from the karinda of the plaintiff as to his rights or asked for any permission to build the house. On the other hand the karinda took no steps to interfere with the building. The *wajib ul arz* of the penultimate settlement of the village contained these provisions:—"Without our consent no body can settle in any place possessed by us (*i.e.*, the zamindars)," and again:—"A rayat occupying any house cannot be turned out of it by any body so long as he lives in it, but he is not empowered to alienate the site. He can remove and sell the materials of the building constructed by him." In January 1902 the plaintiff brought the present suit asking that the principal defendant (the purchaser) might be ordered to remove the materials of the house erected by him within a time to be fixed by the Court, failing which they might be declared to be the property of the plaintiff. *Held*, by AIKMAN, *J.*, that the conduct of the plaintiff's karinda under the circumstances amounted to an acquiescence in the acts of the principal defendant and was binding on his principal, the plaintiff. *Ramsden* v. *Dyson*, *L. R. 1 E. and I. A. 129*, and *Sri Girdhariyi Maharaj* v. *Chote Lal*, *I. L. R. 20 All. 218*, referred to. *Per* KNOX, *Acting C. J.*, *contra*—The principal defendants, vendors, had no right to sell anything more than the materials of their house: no title to the site passed to the purchasers, and under the circumstances the inaction of a karinda, whose authority was limited, could not be taken to bind the plaintiff. *Chajju Singh* v. *Kashia*, *Weekly Notes*, *1891*, *p. 114*, *Sri Girdhariyi Maharaj* v. *Chote Lal*, *I. L. R. 20 All. 218*, and *Ramsden* v. *Dyson*, *L. R. 1 E. and I. A. 129*, referred to. RAJ NARAIN MITTER v. BUDH SEN (1905) . . I. L. R. 27 All. 338

3 EASEMENT.

——— *Prescription.*—A tenant of land cannot acquire an easement by prescription in other lands of his lessor. *Udit Singh* v. *Kashi Ram*, *I. L. R. 14 All. 155*; *Jowab Ali* v. *Allahaddin*, *1 C. W. N. 151*, referred to. It does not make any difference, if the tenant has permanent rights in the land. A tenant always derives his rights

LANDLORD AND TENANT—*continued.*

2 CUSTOM—*concluded.*

LANDLORD AND TENANT—*continued.*

3. EASEMENT—*concluded.*

from the lessor and as the latter cannot have the right of enjoyment of an easement *as of right* against himself, so neither can his tenant against him. MONI CHANDRA CHUCKRABUTTY *v.* BAIKANTA NATH BISWAS (1905) . . . 9 C. W. N. 858

4. EJECTMENT.

——— *Presumption as to tenancy being permanent—Long continuous possession on payment of unchanged rent—Transfers of holding and erection of buildings on it—Recognition by landlord of transfer of holding—Surrender by tenant—Construction of pottah and kabuliyat.*—Suit for ejectment in which the defendant claimed a permanent tenure in the land in dispute, basing his title upon a series of transmissions of it by sale or mortgage, which went as far back as 1852, each transmission purporting to be of a permanent inheritable right, and upon the continuous possession of his predecessors in title at an unchanged rent. The plaintiff, who was a lessee of the land under the Matwali of the Hooghly Imambara, alleged that the defendant was merely a tenant-at-will, and that the transmissions were not recognized by his predecessors in title and were not binding on him, and relied on a pottah and kabuliyat granted to the defendant by the Matwali in 1852 as being the origin of the defendant's holding, contending that on the construction of those documents there was at the date of them an "istifa," or surrender, of the land to the landlord by the former tenant. No document of surrender was produced:—*Held* (reversing the decision of the High Court), that on the true construction of the pottah and kabuliyat (which referred to a deed of sale to the defendant's predecessor of the same date and spoke of the jumma as "according to former custom and practice") no more was implied than that the seller acknowledged that he had parted with the land. No inference of a surrender by the tenant could be made from them, but they attested the landlord's recognition of the transmission of the property by an instrument purporting to convey a permanent inheritable right, and taken, with the other facts of the case, they established the defendant's title. In such cases the question is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant. See *Upendra Krishna Mandal v. Ismail Khan Mahomed, I. L. R. 32 Calc. 41.* NILRATAN MANDAL *v.* ISMAIL KHAN MAHOMED (1905) . . . . I. L. R. 32 Calc. 51 s.c. L. R. 31 I. A. 149

——— *Permanent tenure, presumption as to—Long continuous possession on payment of unchanged rent—Transfers of holding and erection of buildings on it—Kabuliyat, construction of —Recognition by landlord of transfers of holding.* —Suit for ejectment in which the defendant claimed a permanent tenure in the land in dispute, founding his title upon a series of transmissions of it by sale and mortgage, which went as far back as 1826, each transmission purporting to be of a permanent inheritable right, and upon the continuous possession of his predecessors in title at an unaltered rent. The plaintiff, who was a lessee of the land under the Matwali of the Hooghly Imambara, alleged that the defendant was merely a tenant-at-will and that the transmissions were not recognized by his predecessors in title, and were not binding on him; and relied on a kabuliyat granted to the defendant by the Matwali in 1830 as being the origin of the defendant's holding:—*Held* (reversing the decision of the High Court), that on the true construction of the kabuliyat it was not the creation of a fresh holding, but a recognition of an already existing right over which the Matwali had no control, and that, the receipts proving an uninterrupted payment of an unchanged rent, the defendant had made out his case. See *Nilratan Mandal v. Ismail Khan Mahomed, I. L. R. 32 Calc. 51.* UPENDRA KRISHNA MANDAL *v.* ISMAIL KHAN MAHOMED (1905) . . I. L. R. 32 Calc. 41 s.c. L. R. 31 I. A. 144

——— *Onus.*—Plaintiff as zamindar sued to recover from defendants possession of certain lands, which he claimed to be his *zerait* lands. Defendants admitted plaintiff's title as zamindar, but set up a title as raiyats. The Court of first instance decreed plaintiff's claim holding that the lands were his *zerait* lands. The lower Appellate Court dismissed plaintiff's suit as regards most of the lands holding that the plaintiff had failed to establish that those lands were his *zerait* lands: *Held*, remanding the case.—That the suit had been wrongly dismissed, and the plaintiff can claim a decree, unless the defendants prove the existence of a tenancy, which will entitle them to retain possession. Where the owner of land seeks to recover possession on the allegation that the party in possession had no right to continue in it and his title to possession is proved or admitted, he can claim a decree, unless the party in possession proves the existence of a tenancy, which entitles him to retain possession. NARSING NARAIN SINGH *v.* DHARAM THAKUR (1905). 9 C. W. N. 144

——— *Transfer of non-transferable holding —Sub-lease by transferee.*—Where defendants Nos. 2 and 3, who had a non-transferable occupancy holding sold it to defendant No. 1 and took an underlease of the same from the latter. *Held*, that the landlord was entitled to get a decree for possession against defendant No. 1 and was not entitled to get *khas* possession against defendants Nos. 2 and 3, but only to receive rent from them. DINA NATH ROY *v.* KRISHNA BEJOY SAHA (1905). 9 C. W. N. 379

——— *Ejectment suit—Pleadings—Neither party setting up tenancy—Notice to quit—Second appeal—Finding inconsistent with pleading.*—In a suit for ejectment in which neither party set up a tenancy, the lower Appellate Court found the defence set up to be a fraudulent one, but refused to make a decree for ejectment holding that the defendant was a yearly tenant and so entitled to a proper notice to quit: *Held*, that the suit ought to have been decreed. The lower Appellate Court could not make for the defendant a case which was different

LANDLORD AND TENANT—*continued*

4. EJECTMENT—*concluded*

from, and inconsistent with, that set up by him. *Kali Krishna Tagore* v *Golamali*, *I L R 13 Calc 248*; *Unpamma Devi* v *Vaikinta Hegde*, *I L R 17 Mad. 218*; and *Vithu* v *Dhondi*, *I L R 15 Bom 407*, distinguished SUFIAR AHMED CHOWDHURY v GANGA CHARAN GHOSH (1905) 9 C. W. N. 460

——— *Agricultural tenancy—Disclaimer of landlord's title—Forfeiture—"Disclaimer," what amounts to—Putting landlord to proof of his title—Denying landlord's right to receive the entire rent—Estoppel by matter of record—Disclaimer made in written statement in a suit to eject*—There is no disclaimer of the relationship of landlord and tenant where the tenant merely puts the landlord to the proof of his alleged title by purchase; nor where the tenant merely questions the extent of the landlord's interest and his title to receive the entire rent. When in a previous rent suit, the tenancy being agricultural, the defendant objected that the plaintiff alone was not entitled to realise the whole rent and the suit was dismissed, because the plaintiffs' right to collect any share of the rent separately from his alleged co sharers was not established. *Held*, that in a subsequent suit for ejectment brought by the plaintiff in which he succeeded in establishing his exclusive title to the land, the defendant was not "estopped by a matter of record" from relying on his tenancy as a defence to such a suit *Nilmadhab* v *Anantram*, *2 C W N 755*; and *Fyaj Dhali* v *Aftabuddin 6 C W N 575* doubted as being in conflict with *Debiruddi* v *Abdur Rahim*, *I L R 17 Calc 1006*; and *Dhora* v *Ramjiwan*, *I L R 20 Calc 101*, distinguished. The disclaimer of landlord's title which is relied on as a ground for ejecting the tenant must have been made before the suit in ejectment was instituted A disclaimer contained in the written statements of the defendant cannot be made the basis of a decree for ejectment in the suit. MALLIKA DASSI v MANHAM LAL CHOWDHURY (1905)

9 C. W. N 928

5 ENHANCEMENT OF RENT

——— *Bengal Tenancy Act (VIII of 1885), s 29, cl (b) proviso (i) Average rate of rent—Registered kabuliat*—Proviso (i) to s 29 of the Bengal Tenancy Act (VIII of 1885) does not control cl. (b) of that section. The landlord of an occupancy raiyat cannot, therefore, recover rent at the rate at which it has been paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed if such rate exceeds by more than two annas in the rupee the rent previously paid by the raiyat. *Mathura Mohun Lahiri* v *Mati Sarkar*, *I L R 25 Calc 781* so far as it decides to the contrary, was wrongly decided. The rate contemplated by proviso (i) is not the average rate. BEPIN BEHARI MANDAL v KRISHNADHAN GHOSE (1905) . . I. L. R 32 Calc. 395

6. FIXTURES

——— *Lease—Assignment of lease—Privity of contract—Liability to repair—Transfer of Property Act (IV of 1882), s 3*—The word

LANDLORD AND TENANT—*continued*

6. FIXTURES—*concluded*

fixture is one of common use in English law, but in India the word is not so familiar, and the maxim *'quicquid plantatur solo solo cedit,'* on which the law of England as to fixtures seems to have been originally founded, has never received so wide an application here as there. For anything to be a *fixture* it must be "attached to the earth" as that expression is defined in s 3 of the Transfer of Property Act. Where the occupiers of premises *continue in possession in the belief common to them and* the owner of such premises that they hold under the terms of a lease, which had never been as a guel to them by the original lessee and which had expired, they are bound to carry out such covenants as to repairs, etc., as would have to be performed under the lease within a period of similar duration to that during which they hold possession, their liability being based on the footing of a tenancy that commenced at the expiration of the lease and not on any *privity of contract or estate, whether legal or equitable*, created by the lease CHATURBHUJ v THOMAS J BENNETT (1905)

I. L. R. 29 Bom. 323

7 FORFEITURE.

——— *Lease under transferee—Non-transferable holding, sale of—Limitation Act (XV of 1877), s 4*—A tenant does not lose his right in his holding by an unauthorised alienation, if he is still on the land; and the landlord will not be entitled in such a case to enter upon the land merely by reason of the unauthorised transfer by the tenant, who still continues in possession, unless there is a clause for forfeiture and re-entry in the contract by which the tenancy was created *Dwarka Nath Misser* v *Harrish Chunder*, *I L R 4 Calc 925*, distinguished. *Krishnadhar Biswas* v. *Madan Sardar*, *I L R 9 Calc 649*, referred to NANDRU MANDAL v KARTICK MANDAL (1905)

9 C W. N. 58

——— *Forfeiture of lease for non payment of rent, when period of grace allowed for payment—Transfer of Property Act (IV of 1882), s 114*—A Mulageni chit or permanent lease of 1866 for building purposes provided that the lessee should pay to the lessor a rent of Rs per annum by the 24th May of each year; and if any arrears remained due they should be paid within a further period of three months or by the 24th August, and if not so paid, the Mulageni chit to stand cancelled. In a suit brought for cancelling the lease and recovering the demised premises on the ground amongst others that the rent due on the 24th May 1898 was not paid by the 24th August 1898:—*Held*, affirming the decree of the lower Appellate Court, that the condition of forfeiture for non payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given. *Narayana Kamti* v *Nanda Shetty*, *S A. No. 89 of 1900*, unreported, referred to and followed The provisions of the Transfer of Property Act do not apply to the lease. Even under s 114

LANDLORD AND TENANT—*continued.*

7. FORFEITURE—*concluded.*

of the Transfer of Property Act, relief against forfeiture is discretionary and may depend on whether the lease allows a reasonable period of grace. NARAINA NAIKA *v.* VASUDEVA BHATTA (1905).

I. L. R. 28 Mad. 389

8. HOLDING OVER.

——— *Liability of co-tenants for—Transfer of Property Act (IV of 1882), s. 116—Lease—Estate of deceased co-tenant, when liable for holding over.*—The holding over by one or more co-tenants without the consent of the others cannot render persons not so holding over liable for rent. *Draper* v. *Crofts, 15 M. & W. 166 (1846),* followed. In order to make the estate of a deceased co-tenant liable for rent due for holding over, onus lies heavily on the plaintiff to prove clearly and conclusively that after the expiry of the old lease a new contract was made by and between the plaintiff on the one hand and all the co-tenants including the co-tenant, whose estate is sought to be made liable on the other making themselves jointly and severally liable to perform the conditions of the tenancy. BROJO LAL ROY *v.* R. BELCHAMBERS (1905).

9 C. W. N. 340

9. HOMESTEAD.

——— *Homestead lands—Agricultural lands—Transfer of Property Act.*—The incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands before the passing of the Transfer of Property Act: and the party alleging transferability had to prove a custom to that effect. *Hari Nath* v. *Raj Chandra, 2 C. W. N. 122,* referred to. *Beni Madhub Banerjee* v. *Jaikrishna Mookerjee, 7 B. L. R. 152,* distinguished. MADHU SUDAN SEN *v.* KAMINI KANT SEN (1905) . 9 C. W. N. 895

10. JOINT PROPERTY.

——— *Co-sharers, suit for rent by—Liability for rent.*—The plaintiff and the defendants, being some of the co-owners of a zamindari, purchased certain holdings under the zamindari and were in occupation of separate portions of them:—*Held,* the defendants were not, in the absence of any agreement between themselves and the plaintiff to pay him rent, the tenants of the plaintiff in respect of the lands actually occupied by them, and were not liable to pay him rent for the same. GIRINDRA CHANDRA PAL CHOWDHRY *v.* SREENATH PAL CHOWDHRY (1905)

I. L. R. 32 Calc. 567

11. LEASE.

——— *Repudiation of lease—Rescission—Suit for rent—Denial of liability to pay rent on the ground of lessee not obtaining possession, effect of.*—Plaintiff brought a suit for a declaration of her title to and to recover possession of two villages, which she alleged had been leased to her by a *dar-putni* lease by defendant No. 6, who had obtained a *putni* lease of the same together with other villages from the father of defendants Nos. 1 to 5. Defendant No. 1, *inter alia,* stated that defendant No. 6 had forfeited all right to them as in suits brought by the father of defendants Nos. 1 to 5 for the rent of those and other villages covered by the *putni* lease the defendant had pleaded that he was not bound to pay rent for those villages as he had never been placed in possession of them. *Held,* that the conduct of the defendant No. 6, the lessee of the *putni* lease in the course of the litigation between him and the father of defendants Nos. 1 to 5, could not be treated as a repudiation or rescission of the lease so far as it covered the villages in suit. HARA SUNDARI DEBYA *v.* JOGENDRA NATH MOZUMDAR (1905). . 9 C. W. N. 387

LANDLORD AND TENANT—*continued.*

11. LEASE—*concluded.*

——— *Lease given for building purposes—Presumption of permanency.*—Where a lease is given for building purposes the Court may well presume that it was intended to be a perpetual grant. *Juhooreelal Sahoo* v. *H. Dear, 23 W. R. 399, Ismail Khan Mahomed* v. *Jaigoon Baibee, 4 C. W. N. 210: s.c. I. L. R. 27 Calc 570,* relied on. *Lala Beni Ram* v. *Kundan Lal, 3 C. W. N. 502: s.c. L. R. 26 I. A. 58,* distinguished. PROMODA NATH ROY *v.* SRI GOBINDO CHOWDHURY (1905)

9 C. W. N. 463

12. PRE-EMPTION.

——— *Re-sale of property claimed by pre-emptor—Second purchaser impleaded in pre-emptor's suit and issues determined as to his rights—Lis pendens—Estoppel.*—After the filing of a suit for pre-emption, but before service of summonses the heirs of the vendee re-sold the property claimed. The plaintiff impleaded the new vendee in his suit and amended his plaint, raising fresh issues as against the defendant so added, and the added defendant also filed a written statement. The issues raised between the plaintiff and the added defendant were heard and ultimately decided in favour of the plaintiff. *Held,* that the plaintiff could not, after himself causing the second vendee to be added as a party and issues to be decided as to his rights, still plead in bar of the claim put forward by that defendant, the doctrine of *lis pendens. Narain Singh* v. *Parbat Singh, I. L. R. 23 All. 247,* distinguished. MANPAL *v.* SAHIB RAM (1905).

I. L. R. 27 All. 544

——— *Wajib-ul-arz—Interpretation of document—Mortgage by conditional sale—Cause of action.*—The pre-emptive clause of wajib-ul-arz ran as follows:—"If any co-sharer would sell his share, he must first offer it to the *biradaran haqiqi shariq haqiyat.* If they refuse, then to the other co-sharers of his patti. If none of his patti will take it, then to the owners of another patti. If all the owners of the *khalsa* will not purchase, then the owners of Chak Bazyaft shall have a right to pre-emption; and if they refuse, the owner may sell to whomsoever he likes. So too in the sale of Chak Bazyaft, precedence

LANDLORD AND TENANT—*continued.*

12. PRE-EMPTION—*concluded*

must be given to the *Khaleewalas*. In order to decide the price, if the shafi offer Rs200 per biswa to the purchaser in case of sale or Rs150 in case of mortgage, the property cannot be transferred to an outsider (*wo kul badast ghair muntaqil na kar sakega*)." *Held* that in the case of a mortgage by conditional sale two causes of action arose, first, when the mortgage was made, and again when the conditional sale became absolute. *Alu Prasad* v. *Sukhan*, *I. L. R. 3 All. 610*, referred to. *Held* also, that the stipulation as to the price to be paid by the pre-emptor was of the nature of a covenant running with the land and was enforcible even against a *bonâ fide* purchaser. *Karim Bakhsh Khan* v. *Bhola Bibi*, *I. L. R. 8 All. 102*, referred to. BAHADUR SINGH v. RAM SINGH (1905) . . . I. L. R. 27 All. 12

——— *Wajib-ul-arz—Interpretation of document*—A claim for pre-emption was put forward on the basis of a wajib-ul-arz, the material clause of which ran as follows:—"Up to now there has been no suit for pre-emption, but we accept the right of pre-emption." The previous wajib-ul-arz of the village, of date some 22 years earlier, contained this provision as to the right of pre-emption:—"If a co-sharer is desirous of transferring his share, he shall transfer it, first, *to his near relative* and next *to co-sharers in the village* and on their refusal he may *mortgage or sell it to any one he likes*.' *Held*, on a construction of these two documents, that they amounted to a record of a custom of pre-emption as prevailing in the village; also that a near relative need not also be a co-sharer; the two were distinct classes of pre-emptors, the near relative having the prior claim. *Abdul Wahid* v. *Wilayat Husain*, *Weekly Notes*, 1902, p. 103, referred to. RAM DIN v. PURNAN SINGH (1905) . . . I. L. R. 27 All. 553

——— *Wajib-ul-arz—Construction of document—Partition of village into separate mahals—Provisions of existing wajib-ul-arz as to pre-emption copied verbatim into wajib-ul-arzes of new mahals*—Where on partition of a village into two separate mahals the provisions of a former wajib-ul-arz, which recorded a custom of pre-emption as existing in favour of, amongst others, "co-sharers in the village," were copied *verbatim* into the wajib-ul-arz of each of the new mahals, it was *held* that the effect of this was to leave to the co-sharers in each of the new mahals rights of pre-emption *inter se*. A "village" (*gaon mauza* or *dek*) is not the same thing as a "mahal" and must not be confounded therewith, nor does the breaking up of a village into separate mahals of necessity destroy all the existing rights as to pre-emption of the co-sharers in the village. *Gokal Singh* v. *Mouna Lal*, *I. L. R. 7 All. 772*; *Mata Din* v. *Mahesh Prasad*, *Weekly Notes*, 1892, p. 100; *Ghasi* v. *Man Singh*, *I. L. R. 17 All. 226*; and *Daljangan Singh* v. *Kalka Singh*, *I. L. R. 22 All. 1*, referred to. AUDHH LAL v. RAM BHAJAN LAL (1905) . . . . I. L. R. 27 All. 602

LANDLORD AND TENANT—*continued*

13. POSSESSION

——— *Possession of property under attachment by Magistrate—Criminal Procedure Code (Act X of 1882), s. 146—Abandonment.*—Where on account of a dispute between rival tenants under the same landlord regarding possession of certain lands, the Magistrate, acting under s. 146 of the Criminal Procedure Code, attached the lands, and settled them with outsiders on yearly settlements, and neither of the rival tenants brought any suit to establish their title to the lands or paid any rent for them to the landlord since the date of the attachment. *Held*, that the possession of the Magistrate was possession on behalf of such of the rival tenants as might establish a right to possession on their own account and the money realized by the Magistrate from the persons settled by him on the lands was held on behalf of such tenants and not on behalf of the landlord. *Held* also that the above facts did not constitute abandonment of the lands by the rightful tenants. BENI PRASAD KHORI v. SHAHZADA OJHA (1905) . . . . I. L. R. 32 Calc. 856

14. RENT

——— *Non-payment of rent.*—Non-payment of rent does not determine the relation of landlord and tenant. APURBA KRISHNA ROY v. ASHUTOSH DUTT (1905) . . . . 9 C. W. N. 122

15. MISCELLANEOUS

——— *Occupancy tenant—Usufructuary mortgage—Relinquishment of tenancy during the term of the mortgage—Held*, that an occupancy tenant, who has made a usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Badri Prasad* v. *Sheodhian*, *I. L. R. 18 All. 354*, followed. RANNU RAI v. RAFI-UD-DIN (1905) . . . I. L. R. 27 All. 82

——— *Rights of tenants in the village abadi—Wajib-ul-arz—Suit to remove building erected by tenant without permission of the zamindars*—In the courtyard of a tenant lawfully in possession of a house site in the village *abadi* was "some sort of a thatched shed" used in fact by the tenant and other Muhammadans of the village for the purpose of religious observances. The Wajib-ul-arz of the village provided that "no cultivator can build a new 'house' outside the compound of his dwelling house without the permission of the zamindar. He is at liberty to do so in his compound. *Held*, that the tenant in question was not at liberty to convert the thatched shed in his courtyard into a "pacca" mosque without the permission of the zamindars. BASA MAL v. GHAFR-UD-DIN (1905) I. L. R. 27 All. 356

——— *Government settlement—Rate of rent—Obligation of under-tenants—Contract with Government—Jamabandi Regulation (VII of 1822), s. 9.*

LANDLORD AND TENANT—*continued.*

15. MISCELLANEOUS—*continued.*

—On the expiry of the term of a prior settlement the plaintiff took a fresh settlement from the Government of certain lands and contracted with the Government that he would not collect higher rents than are recorded in the settlement papers:—*Held*, that that contract would not prevent him from recovering from the defendants higher rents by enforcing a contract, which the latter had entered into with him. S. 9 of Regulation VII of 1822 does not render such an agreement illegal. S. 9, cl. (1) of Regulation VII of 1822 does not preclude the Court from going behind the Collector's *jamabandi*. *Zamir Mandal* v. *Gopi Sundari Dasi*, *I. L. R. 32 Calc. 463 (footnote)*, followed. GOUR CHANDRA SAHA v. MANI MOHAN SEN (1905) . I. L. R. 32 Calc. 463

——— *Covenant by sub-tenant to pay rent due to superior landlord—Failure to pay—Recovery of same by superior landlord from tenant—Suit by tenant to recover same from sub-tenant—Damages, suit for, if lies—Suit for rent—Bengal Tenancy Act (VIII of 1885), s. 3, cl. (5), Sch. III, Art. 2 (b)—Limitation.*—The defendants took settlement of some lands from the plaintiffs. In the *kabuliat* executed by the defendants, the terms of the agreement were as follows:—"In all fixing the annual rent . . . . at R4,9-1-12-3 and granting a permanent *dur-putni* and *se-putni* settlement . . . you have executed in my favour the . . . *pottah*. I therefore execute this *kabuliat* and agree that I shall pay R3,191-12-3, the annual rent payable into the estate of your paid *putnidars* and *maliks*, and pay the remaining profit of R1,80) a year to you . . . . I shall pay the *putni* and *dur-putni* rents and cesses . . . . payable by you . . . . and take *dakhilas* for that and make them over to you and I shall take *dakhilas* from you . . . . . If by reason of my default in payment of the said rents the *maliks* bring suits for arrears of rent and in execution of decree, your *putni* and *dur-putni* rights be attached and brought up for sale . . . . . then you will deposit the said amount of rent and bring a suit against me for arrears of rent and recover that amount with interest and costs by sale of this my *dur-putni* and *se-putni* rights and from other properties." Defendants failed to pay to the superior landlords rents due for 1304 and 1305 and the latter sued the plaintiff for the same and obtained decrees, in execution of which the properties were attached and advertised for sale. Plaintiffs thereupon paid off the decretal debts on 8th September 1898 and in Bhadro 1308 (7th September 1901) brought this suit for recovery, as damages, of the said amount from the defendant. It was objected that the suit was not maintainable and was barred by limitation: *Held*, that the suit was properly brought as a suit for damages. There were here two separate and distinct covenants, one to pay R3,191 odd to the superior landlords and the other to pay R1,800 as rent to the plaintiffs as landlords. The former amount was not payable as rent as defined in the Bengal Tenancy Act, and plaintiffs' proper remedy was to bring a suit for damages. *Basanta Kumari Debya* v. *Ashutosh Chuckerbutty*, *4 C. W. N. 3*: *s.c. I. L. R. 27 Calc. 67*, distinguished. *Held*, that the present case was undistinguished from *Ratnessur Biswas* v. *Hurish Chunder Bose*, *I. L. R. 11 Calc. 221*, which had not been overruled by the Full Bench in *Basanta Kumari Debya* v. *Ashutosh Chuckerbutty*, *I. L. R. 11 Calc. 221*. HEMENDRA NATH MUKERJEE v. KUMAR NATH ROY (1905) . . 9 C. W. N. 96

——— *Excavations by tenant—Permanent lease—Injunction.*—A tenant holding under a lease of a permanent character has no power to make excavations of such a character as to cause substantial damage to the property demised, although by the terms of the lease he has power to make excavations. GRISH CHANDRA CHANDOO v. SIRISH CHANDRA DAS (1905) . . . . 9 C. W. N. 255

——— *Jote, portion of—Transfer—Validity—Decree for rent against recorded tenant—Unrecorded tenant's interest, effect on—Sherista, landlord's, record in, not compulsory.*—There is no law rendering it obligatory on tenants, who are not tenure-holders, to get their names recorded in the landlord's sherista for the purpose of perfecting their title. Therefore the sale of a *jote* in execution of a decree for rent obtained against the recorded tenants does not pass the interest of the tenants, whose names are not registered in the landlord's sherista. *Nitya Behari Saha* v. *Harigovinda*, *I. L. R. 26 Calc. 677*, distinguished. The case of *Kuldip Singh* v. *Gillanders, Arbuthnot & Co.*, *I. L. R. 26 Calc. 615*, is no authority for the proposition that the purchaser of only a portion of a *jote* gets no title. ASHOK BHUIYAN v. KARIM BEPARI (1905). 9 C. W. N. 843

——— *Liability to pay rent - Kabuliat received by landlord from sub-tenant—Dispossession—Disturbance.*—Where a landlord took *kabuliats* from the under-tenants of his tenant, but the latter was not dispossessed: *Held*, that the tenant was liable to pay rent when as a matter of fact he was not dispossessed and was never disturbed. SRIMATI MONI v. KALACHAND GHARAMI (1905). 9 C. W. N. 871

——— *Sale of non-transferable occupancy holding in execution of decree—Knowledge of judgment-debtor—Confirmation of sale—Civil Procedure Code (Act XIV of 1882), s. 244.*—Defendant owned a non-transferable occupancy holding, which was sold in execution of a decree against him, and one *K* was the purchaser; *K* transferred his interest to the present plaintiff, who instituted the present suit for recovery of possession. *Held*, that the defendant having had full knowledge of the execution proceedings and not having objected to the sale was not competent to resist the purchaser after confirmation of sale. *Durga Charan Mondal* v. *Kali Prosanno Sircar*, *3 C. W. N. 586*: *s.c. I. L. R. 26 Calc. 727*, followed. *Bhiram Ali* v. *Gopi Kanth*, *I. L. R. 24 Calc. 555*, referred to. As between the purchaser and the defendant the title to the property vested in the purchaser on the confirmation of sale. MUBULLAH v. BUBULLAH (1905) . . 9 C. W. N. 973

LANDLORD AND TENANT—*concluded.*

15 MISCELLANEOUS—*concluded*

——— *Specific Relief Act (I of 1877), s 9—Tenant holding over—Dispossession by landlord—Suit by tenant to recover possession—Extraordinary jurisdiction*—A tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord The tenant then brought a suit for possession against the landlord under s 9 of the Specific Relief Act (I of 1877) The Subordinate Judge dismissed the suit The plaintiff (tenant) thereupon applied under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) *Held*, reversing the decree, that the plaintiff (tenant) was not liable to be evicted by the defendant (landlord) *proprio motu* and that he was entitled to a decree for possession. RUDRAPPA v NARSINGRAO (1905) I. L. R. 29 Bom. 213

LANDLORD AND TENANT ACT (BENGAL ACT VIII OF 1869).

See BENGAL TENANCY ACT s 21
9 C. W. N. 141

——— *Right of tenant to hold land for which he refused to accept patta*—A tenant is not entitled to claim lands, for which he refused to accept pattas tendered by the landholder, as having become part of his holding by such tender JUMNA BOI RANEE SAHEB v NOLAI KAVUNDAN (1905) . I. L. R. 28 Mad. 553

LAND REVENUE CODE (BOMBAY ACT V OF 1879).

——— *Right to hold land distinguished from the right to money or revenue—Right of an alienee of the revenue to possession of land—Holdings which an Inamdar acquires by purchase from a kadim occupant or by lapse of prior occupancies distinguished from the rights which he obtains directly from the grant itself—Civil Courts—Jurisdiction.*—The right to hold land is a right distinct from the right to money or revenue, and a suit relating to the former is distinct from a suit relating to the latter The right of an alienee of the revenue to possession of the land *may survive* the resumption of the grant of exemptions from liability to land revenue The decided cases make no distinction between holdings, which an Inamdar has acquired by purchase from a kadim occupant or by lapse of prior occupancies, and the rights, which he may have obtained directly from the grant itself, to hold at his disposal lands comprised therein which at date thereof no other person had a right to occupy If the grant places land at the disposal of the alienee of the revenue, where there are no pre-existing claims to hold it, the alienee, though not an owner of the soil, is entitled to dispose of it as he chooses. He is not bound to give it out to tenants, but may retain it in his own possession, and becomes the holder thereof within the meaning of Bombay Land Revenue Code, 1879; and his rights are as indefeasible so far as the right to possession is concerned as the rights of an occupant of unalienated land The right to hold land, even though it be not as proprietor of the soil, is incontestably one of which the Civil Courts *can take cognizance, if not barred by statutory provision* BALVANT RAMCHANDRA v SECRETARY OF STATE (1905) . I. L. R. 29 Bom. 480

LAND REVENUE CODE (BOMBAY ACT V OF 1879)—*concluded*

——— s. 83—*Inamdar—Grantee of Royal share of revenue or of soil—Miras tenant—Enhancement of rent—Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable*—A grant to an Inamdar may be either of the Royal share of revenue or of the soil; but ordinarily it is of the former description and the burden rests on the Inamdar to show that he is an alienee of the soil. Where an Inamdar is alienee only of the land revenue, then his relations towards those who hold land within the area of the Inam grant vary according to certain well recognized principles. *If the holding was created prior to the grant of the Inam*, then the Inamdar as such can only claim land revenue or assessment, for he has no interest in the soil in respect of which rent would be paid, but if the holding be later in its origin than the Inam grant the lands then comprised in such holding would be the Sheri lands of the Inamdar and he would be entitled to place tenants in possession of them, *even if only a grantee of revenue. With respect to the latter class* of holding, direct contractual relations would be established between the Inamdar and the holder If no such contract can be proved, recourse must be had to s 83 of the Land Revenue Code (Bombay Act V of 1879) In the absence of satisfactory evidence of agreement, the rent is that payable by the usage of the locality and failing that, such rent as, having regard to all the circumstances of the case, shall be just and reasonable In a suit by an Inamdar to enhance rent of Miras land, it must be determined whether what was paid was rent and whether the Inamdar has a right to enhance as against one, who holds on the same terms as the defendant does; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJAYA v BALKRISHNA GANGADHAR (1905) . . . I. L. R. 29 Bom. 415

LEASE.

See CONSTRUCTION OF DOCUMENT
I. L. R. 27 All. 190

See LANDLORD AND TENANT
I. L. R. 29 Bom 323
9 C. W. N. 97, 307

See LIMITATION . I. L. R. 32 Calc. 169

See MORTGAGE . I. L. R. 27 All. 313

See NOTICE TO QUIT.
I. L. R. 32 Calc 123

See SPECIFIC PERFORMANCE.
I. L. R. 27 All. 696

LEASE—*continued.*

See TRANSFER OF PROPERTY ACT, S. 107.
I. L. R. 27 All. 138

——— *Building lease—Lease from year to year—Ejectment, suit for.*—Where a kabuliat did not specify any period during which a lease was to subsist and the land was to be held by the lessee from year to year at an annual rent, and should a masonry building be erected, rent would be assessed at the prevailing rate; and the lessee built a structure on the land: *Held*, that the parties contemplated the possibility of a *pucca* structure being erected on the land and therefore the lease was for building purposes, and the Court could presume that the lease was intended to be permanent, and the plaintiff was not entitled to eject the defendant. *Jahoorulal Sahoor* v. *H. Dear, 23 W. R. 399; Ismail Khan Mahomed* v. *Jaigun Bibi, I. L. R. 27 Calc. 570*, followed. *Lala Beni Ram* v. *Rundanlal, L. R. 26 I. A. 58*, referred to. *Held* also, that the absence of the words "maurasi, mokurari" in a lease did not necessarily indicate that it was not the lessor's intention to grant a permanent lease. PROMADA NATH ROY v. SRIGOBIND CHOWDHRY (1905). . . I. L. R. 32 Calc. 643

——— *Assignment of lease—Mortgage of lease—Liability of the mortgagee to the landlord—Possession of the mortgagee.*—The plaintiff, the Savantvadi State, leased certain lands to defendants 1 to 10. Of these, defendants 1, 2, 3 and 9 mortgaged their shares in the lands to defendant 11; the mortgagee was not put in actual possession of the lands, but subsequently to the execution of the mortgage-deed the tenants of the mortgagor passed *kabuliats* to the mortgagee under which they agreed to pay the mortgagees (defendant 11) R36 per annum. The plaintiff thereafter sued defendants 1—11 to recover the rent of the lands demised. The lower Appellate Court passed a decree against all the defendants, including defendant 11. On appeal by defendant 11 to the High Court: *Held*, that, although it did not clearly appear whether the mortgagee (defendant 11) did receive any of the rents of the property, still he put himself into possession and must be treated as if he had received such rent and that, therefore, he was liable to pay to the plaintiff his share of rent. In India there is no distinction between legal and equitable estates, although in ordinary parlance the distinction is often referred to. Hence, when a lessee mortgages his interest in the land, the mortgagee becomes liable for the rent to the lessor only, if he (the mortgagee) enters into possession of the land or does any act equivalent to entry into possession. VITHAL NARAYAN v. SHRIRAM SAVANT (1905).
I. L. R. 29 Bom. 391

——— *Service tenure—Medical practitioner, services of, in lieu of rent—Notice to quit—Transfer of Property Act (IV of 1882), ss. 105, 106.*—Where *A*, the owner of a house, by an agreement allowed *B* to occupy the house in consideration of his rendering services, as a medical practitioner, to *A*, and his family in lieu of rent; *Held*, that such an agreement amounted to a "lease" as defined in s. 105 of the Transfer of Property Act, 1882, and was terminable at the option of either party by 15 days' notice expiring with the end of a month of the tenancy. JYORISH CHANDRA MUKERJEE v. RAMANATH BHADRA (19 5).
I. L. R. 32 Calc. 243

LEASE—*concluded.*

LEGAL REPRESENTATIVES' SUITS ACT (MADRAS ACT XII OF 1855).

——— s. 1, cl. 2—*Does not apply to suits against the original wrong-doer.*—Cl. 2 of s. 1 of Act XII of 1855 does not apply to an action commenced against the wrong-doer in his lifetime, but only to actions commenced against the executors, administrators or other representatives of a deceased wrong doer. Where therefore a suit is brought against the wrong doer in his lifetime, such suit abates on his death. *Haridas Ramdas* v. *Ramdas Mathuradas, I. L. R. 13 Bom. 677*, followed. *Krishna Behary Sen* v. *The Corporation of Calcutta, I. L. R. 31 Calc. 406*, referred to and approved. RAMCHODE DASS v. RUKMANY BHOY (1905) . . . . I. L. R. 28 Mad. 487

LETTERS PATENT.

——— Art. 12.

See CAUSE OF ACTION.
I. L. R. 29 Bom. 383

——— Art. 12—*Jurisdiction of High Court—Immoveable property situated outside—Moveable property situated within the jurisdiction—Partial partition.*—The members of a Muhammadan family sued their deceased father's brothers to recover from them their share in the family property, which consisted of the capital and profits in a certain business in the town of Madras and two houses and land situated outside the original civil jurisdiction of the Madras High Court. There was no immoveable property situated within the jurisdiction and no leave to institute the suit had been obtained under Art. 12 of the Letters Patent. Plaintiffs asked that the first defendant might be ordered to account for the estate which had come to his hands as an executor *de son tort*; for an administration order, for the appointment of a Receiver, and that they may be put in possession of their shares. On objection being raised as to the jurisdiction of the Court to entertain the suit: *Held* that the suit was one for land or other immoveable property within the meaning of Art. 12 of the Letters Patent in so far as it claims a share of the houses and lands outside the jurisdiction. *Held also*, that the Court had jurisdiction to entertain the suit in so far as it related to the moveable property situated within the jurisdiction. The Court may decree a partition of the moveable property within its jurisdiction, while declining jurisdiction as to immoveable property situate outside the jurisdiction. ABDUL KARIM SAHIB v. BUDRUDDEEN SAHIB (1905) . I. L. R. 28 Mad. 216, 487

LETTERS PATENT—*continued*

——— Art. 12—*Suit for land—Leave of Court—Cause of action—Title—Appeal from order discharging summons*—The plaintiffs asked for a declaration that they were entitled to exclusive possession and enjoyment of a *talao* situated outside the jurisdiction of the Court and that the defendants had no right in or to the same They also sought an injunction to give effect to that declaration and further prayed that it might be declared that they were the exclusive owners of the *talao* *Held*, that the suit was a suit for land and that under the circumstances the Court had no jurisdiction to entertain it. *Held*, also, that an appeal *lies from an order dismissing* a *Judge's* summons to show cause why leave granted under cl 12 of the Letters Patent should not be rescinded and the plaint taken off the file. *Hadjee Ismail Hadjee Hubbeeb* v *Hadjee Maho med Hadjee Joosub* *13 B. L. R 91*, applied Under s 12 of the Letters Patent leave is only required, when the cause of action has arisen in part within the local limits of the ordinary original jurisdiction of the High Court, in every other case either the Court has no power to grant leave or it is unnecessary to obtain it. A Court of Equity in England only assumes jurisdiction in relation to land abroad, when as between the litigants or their predecessors some privity or relation is established on the ground of contract, trust or fraud, but in no case does a Court of Equity entertain a *suit, even if the defendant is within the limits of its jurisdiction* where the purpose is to obtain a declaration of title to foreign land Though it is a general principle that the title to land should ordinarily be determined by the Court within the limits of whose jurisdiction it lies, it is, no doubt, *open to the Legislature to disregard that principle* But the Courts certainly would not lean towards a construction involving that result, where the words of the Legislature are fairly capable of a meaning in conformity with the general principle. The phrase "suit for land" in *s 12 of the Letters Patent* is by no means limited to a suit for the recovery of land: the expression is not to be read with a technical limitation, which had never been associated with it VAGHOJI KUVERJI v CAMAJI BOMANJI (1905)
I. L. R 29 Bom 249

——— Art. 15—*Single Judge refusing an application for review—Judgment—Appeal*—An application for review was made before one of two Judges of a Division Bench, which decided the appeal the *other Judge having* left the Court. The application was refused, the Judge holding that no case had been made out for a re-hearing: *Held*, that the order refusing the application was not a 'judgment' within the *meaning of s 15 of the Letters Patent and was* not appealable. *Rughoobirbee* v *Noor Jehan Begum* *12 W R 459*; *Abhoy Churn Mohunt* v *Shamont Lochun Mohunt*, *I L R 16 Calc 788*, referred to: *Tooleemony Dassee* v *Sudevi Dassee*, *3 C W N 247* v c *I L. R 26 Calc 961*, distinguished MULJI VIRJI v BANGABASI SAHA (1905)
9 C W. N. 502

LETTERS PATENT—*continued*

——— Art. 15—*Appeal—Order by single Judge ordering commission to issue to examine a witness—Civil Procedure Code (Act XIV of 1882), ss 393, 396—Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process*—The present appellants obtained a decree against the late head of a mutt, and, in execution thereof, attached certain gold and silver articles The respondent, the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles *were not liable to be sold in execution of the decree as they were not assets of the deceased, but property* belonging to the mutt. The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, *then applied to the Subordinate Judge to take his evi*dence on commission, stating that he was unable, of his own personal knowledge to give any evidence material to the questions at issue, and alleging that the appellants were insisting on his appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in Court as a witness. The Subordinate Judge refused to issue a commission. On a revision petition being filed, a single Judge of the High Court set aside the order of *the Subordinate Judge* and ordered the respondent *to be examined on commission.* On an appeal being preferred under Art. 15 of the Letters Patent: *Held*, that an appeal lay *Held also* that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the *provisions of the Code of Civil Procedure, and* s. 396 is exhaustive, and provides for all the cases in which the Legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction. *Held further*, that a litigant's privi*lege of taking out summonses to witnesses is subject* to the control of the tribunal, which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its pro*cess* *In the present case, the appellant's application* was not *bond fide*, and the respondent's attendance in Court was required, not for the purpose of obtaining material evidence, but from other motives, and the order for the issue of a commis*sion was therefore rightly made* VENKATADRIAN CHETTY v NATARAJA DESIKAR (1905)
I. L. R. 28 Mad. 28

——— *Art. 29—Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden*—*Held*, that the High Court of Bombay can under cl. 29 of the amended *Letters Patent, transfer to itself a case pending in* the Court of Session at Aden. EMPEROR v ROBERT COMLEY (1905) I. L. R. 29 Bom 575

——— Art. 39—*Division Court—Civil Procedure Code (Act XIV of 1882), ss 595 and 596*

LETTERS PATENT—*concluded.*

—Where on an appeal to His Majesty in Council the case was sent back to the High Court with a direction that certain accounts might be taken on a certain footing and a Division Bench of the High Court took those accounts and made a final decree. *Held*, that an appeal would lie to His Majesty in Council from such decree under cl. 39 of the Letters Patent, the amount in dispute being over ₹10,000. The expression "Division Court" in that section is not restricted to a Division Court sitting on the Original side. Ss. 595 and 596 of the Civil Procedure Code do not apparently apply to such a case. GURU PROSUNNO LAHIRI *v.* JOTINDRA MOHUN LAHIRI (1905) . I. L. R. 32 Calc. 983
s.c. 9 C. W. N. 568

LETTERS OF ADMINISTRATION.

——— *Court Fees Act (VII of 1870), s. 19D —Court Fees Amendment Act (XI of 1899), s. 19I —Letters of Administration—Limited grant—Trust property—Exemption from probate duty.*—One Harilal died possessed of certain shares in Joint Stock Companies and in the Bank of Bombay valued at ₹11,980 standing in his name as their registered holder. He left three sons. The sons applied for letters of administration limited to one share only valued at ₹275 and their application was granted. Subsequently they applied for letters of administration with respect to all the shares except the one for which limited letters of administration had already been granted and claimed exemption from stamp duty. The question arose as to whether they were entitled to the exemption. *Held*, that the property with respect to which the letters of administration were sought being property held in trust by the deceased for the joint family, the property was entitled to exemption from the Court-fee. *Held* further, that the exemption of trust estates from the payment of *ad valorem* Court-fee is not conditional on the circumstance that there had been a previous grant of probate or letters of administration on which a Court-fee had been paid. The exemption has reference to the character of the property and not to the procedure adopted. *The Collector of Ahmedabad* v. *Savchand, I. L. R. 29 Bom. 140*, disapproved. *In the Goods of Pokurmull Augurwallah, I. L. R. 23 Calc. 980*, followed. COLLECTOR OF KAIRA *v.* CHUNILAL (1905) . . I. L. R. 29 Bom. 161

LIBEL.

——— *Privileged occasion—Malice, test of —Express malice—Bonâ fide statement.*—In an action to recover damages for libel, if it is proved that what the defendant wrote was written *bonâ fide* in answer to the attack made on him by the plaintiff and for the sole purpose of defending himself from such an attack, then the occasion is privileged. *O'Donoghue* v. *Hussey, Ir. R. 5 C. L. 124*, referred to. But if the statements made are false to the knowledge of the defendant, or if a portion of the statements is irrelevant and unconnected with the matter in dispute, then the privilege of the occasion is destroyed

LIBEL—*concluded.*

or, rather, there would then be evidence of express malice to destroy the privilege. *Clark* v. *Molyneux, 3 Q. B. D. 237*, and *Picton* v. *Jackman, 4 C. and P. 257*, referred to. The proper test in enquiring whether the nature of the words by themselves afford evidence of malice, is to take the facts as they appeared to the defendant's mind at the time of publication and to ask whether the words used are such as the defendant might have honestly and *bonâ fide*, under the circumstances, employed; and the particular expressions used ought not to be too closely scrutinised, provided the intention of the defendant was good and he acted *bonâ fide*. *Spill* v *Maule, L. R. 4 Exch. 232, Woodward* v. *Lander, 6 C. and P. 548*, and *Laughton* v. *Bishop of Sodor and Man, L. R. 4 P. C. 495*, referred to. AMRITA NATH MITTER *v.* ABHOY CHARAN GHOSH (1905) . . I. L. R. 32 Calc. 318

LIGHT AND AIR.

——— *Obstruction—Occupation uncomfortable—Rule of 45°—Injunction—Decree.*—In a suit for an injunction to restrain the defendant from obstructing the access of light and air to the plaintiff's windows the first Court granted an injunction solely on the ground that the defendant's new building left the plaintiff with less than 45° of light, and dispensed with any further evidence. On appeal the lower Appellate Court reversed the decree on the ground that no evidence had been adduced to show that there was a diminution of light. *Held*, that both the lower Courts were in error and that the case must be remanded for the determination of the following issues:—(1) Has there been a diminution in the quantity of light and air, which has been accustomed to enter the windows of the plaintiff's house during the whole of the prescriptive period? (2) If so, has there been a deprivation of light and air sufficient to render occupation of the house uncomfortable? CHOTALAL MOHANLAL *v.* LALLUBHAI SURCHAND (1905) . . I. L. R. 29 Bom. 157

LIMITATION.

See ADVERSE POSSESSION.
I. L. R. 27 All. 436

See AGRA TENANCY ACT.

See BENGAL TENANCY ACT, SCH. II, ART. 3.
9 C. W. N. 54

See CALCUTTA MUNICIPAL ACT, S. 634.
9 C. W. N. 217

See CERTIFICATE I. L. R. 32 Calc. 691

See CIVIL PROCEDURE CODE, S. 54.
9 C. W. N. 844

See CIVIL PROCEDURE CODE, SS. 206, 244, 278 AND 283.
I. L. R. 27 All. 464, 485, 575

See CIVIL PROCEDURE CODE, SS. 230, 295.
I. L. R. 28 Mad. 224

See DECREE . I. L. R. 32 Calc. 908

LIMITATION—*continued*

See EXECUTION OF DECREE
I. L. R. 27 All. 334, 378

See HINDU LAW . I. L. R. 27 All. 494

See HINDU LAW—WILL.
6 C. W. N. 25, 1033

See LANDLORD AND TENANT
9 C. W. N. 96

See LIMITATION I. L. R. 32 Calc. 669

See MAHOMEDAN LAW
9 C. W. N. 825

See MUNICIPALITY I. L. R. 29 Bom. 35

See PARTIES . I. L. R. 32 Calc. 582

See PRESCRIPTION . 9 C. W. N. 292

See TRUST . . I. L. R. 27 All. 513

——— *Civil Procedure Code (Act XIV of 1882), ss. 373, 374—Limitation Act (XV of 1877), s. 14—Cause of like nature—Withdrawal of a suit with permission to bring another*—On the 15th April 1898, two plaintiffs, a father and son, filed a suit against two defendants to recover damages for an assault, which took place on the 7th April 1898. The defendants pleaded misjoinder of parties and of causes of action. On the 14th November 1901, the High Court on appeal gave effect to this plea of the defendants but under s. 373 of the Civil Procedure Code gave leave to one of the plaintiffs, whose name was struck out, to file, if so advised, a fresh suit in respect of his own cause of action. The plaintiff, whose name was so struck out, filed this suit on the 13th February 1902. *Held*, that the second suit was barred by limitation, for when a suit is withdrawn under s. 373 of the Civil Procedure Code, with permission to bring a fresh suit, the effect of s. 374 of the Code, is that limitation is to apply to the second suit as if it was the first. *Held*, also, that s. 14 of the Limitation Act did not apply to such a case. *Krishnaji Dakshman v. Vithal Ravji*, I. L. R. 13 Bom. 625, followed. VARAJLAL v. SHOMESHWAR (1905) I. L. R. 29 Bom. 219

——— *Putni lease, granted by person having no interest or only a limited interest in estate—Suit to set aside—Limitation—Cause of action—Reg. II of 1803 as amended by Reg. II of 1805—Act XIV of 1859—Hindu widow's estate—Alienation—Legal necessity—Novation*—In a suit to set aside a *putni* granted in 1837 by a person, who either had no interest in the property or was only acting as the manager of a lady, who owned a Hindu widow's estate therein. *Held*, that if the *putni* was void, the period of limitation ran from the date on which it was granted, under Regulation II of 1803, as amended by Regulation II of 1805. If it was voidable only by the widow's successor the right of action arose on the adoption of a son by the widow and time began to run from the date when the adopted son attained his majority in 1856. Under either Regulation II of 1803 or Act XIV of 1859, time ran from the date on which the cause of action arose

LIMITATION—*continued*.

RANGALAL ROY BAHADUR v. JAGAT CHANDRA BROWNICK (1905) . . . 9 C. W. N. 673
s.c. I. L. R. 33 Calc. 669; 9 C. W. N. 673
L. R. 33 I. A. 80

——— *Trespass—Possession—Char lands—Jungle lands*—The nature of *char* and *jungle* lands is peculiar and the mere cessation of possession cannot amount to discontinuance of possession, unless it is followed by the possession of another person, in whose favour time would run. A mere trespass without claim of right, as in the case of a squatter, does not amount to an ouster of the true owner. *Watson v. Government*, 3 W. R. 75, 81, referred to. During the period when a piece of land is submerged under water the true owners must be held to be in constructive possession, and when it re-appears and does not become fit for actual enjoyment in the usual modes, it may be presumed that the previous possession continues until the contrary is proved. *The Secretary of State for India in Council v. Krishnamoni Gupta*, 6 C. W. N. 317: s. c. I. L. R. 29 Calc. 518, followed. *Mahomed Ali Khan v. Khaja Abdul Ganny*, I. L. R. 9 Calc. 711; and *Mohima Chunder Mazoomdar v. Mahesh Chandra Neogy*, I. L. R. 16 Calc. 473, referred to. MADHABI SUNDARI DASSYA v. GAGANENDRA NATH TAGORE (1905) . . . 9 C. W. N. 111

——— *Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), ss. 135, 136, 137, 144—Appeal—Revision—Order in execution—Order passed without jurisdiction, effect*—Under Bengal Act I of 1879 as it stood before its amendment by Act V of 1903, an order made by a Deputy Collector relating to the execution of a decree for rent was open neither to appeal nor revision. An agreement of parties cannot authorise a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes. *Kelsey v. Forsyth*, 21 Howard 85, and *United States of Emioll*, 15 Otto 414, referred to. A judgment of a Court which has no jurisdiction over the subject matter of the litigation must be treated as null and void, and need not be adjudged to be such by a formal and direct proceeding to have it vacated and reversed. On the 13th May 1899 the appellant obtained a decree for rent under Bengal Act I of 1879; on the 5th February 1902 the appellant applied for execution of his decree and the application was struck off on the 15th March 1902, no steps having been taken. A second application for execution made on the 10th March 1903 was dismissed by the Deputy Collector on the ground of limitation, but the Divisional Commissioner on revision reversed that order on the 1st August 1903. On the 8th August 1903 the decree holder presented a third application for execution which was struck off on the 5th December following, no action having been taken. On the 23rd December 1903 the decree-holder presented a fourth application for execution. The question was whether this application was barred. *Held*, that the order of the Divisional Commissioner was without jurisdiction and must be treated as a nullity and that it was not necessary for the judgment-debtor to have the order set aside, but it was

LIMITATION—*continued.*

open to him to shew in the present proceedings that it had never any lawful existence. That the application was therefore barred by limitation. GOLAB SAO *v.* CHOWDRY MADHO LAL (1905) 9 C. W. N. 957

——— *Adverse possession—Suit to recover profits of sír land in an undivided mahal.*—In a suit to recover his share of the profits of certain sir land appertaining to an undivided mahal the plaintiff had not been in receipt of profits in respect of the sír land in suit for more than twelve years; but he and his predecessor in title had been in receipt of their shares of the rents and profits of the undivided mahal, other than of the particular sír land in question, continuously:—*Held*, that the mahal being undivided, the defendant's possession of the sír land, the profits of which were claimed, had never really been in possession hostile to the plaintiff, and the suit was therefore not barred by limitation. RAJ BAHADUR *v.* BHARAT SINGH (1905) . . . I. L. R. 27 All. 348

——— *Negotiable Instruments Act (XXVI of 1881), ss. 8, 32, 78—Promissory note taken in name of adoptive mother—Suit by minor adopted son—Benami transaction—Maintainability.*—A minor sued by his next friend in August 1903 to recover the amount due on a promissory note, executed in September 1897 in favour of his mother and alleged to have been made and delivered on account of his estate:—*Held*, that the suit was barred by limitation. A benamidar or trustee, who takes a note in his own name is the person entitled in his own name to the possession thereof and not the *cestui que trust* or person for whom he holds the note. He is therefore the proper person to sue upon it. *Held, also*, that the infant son was not the holder or payee or a person entitled at any time to sue upon the note. RAMANUJA AYYANGAR *v.* SADAGOPA AYYANGAR (1905) . . . . I. L. R. 28 Mad. 205

——— *Suit for damages—Suit for rent—Whether a suit for rent payable by tenant under lease to superior landlord is one for rent or damages—Bengal Tenancy Act (VIII of 1885), s. 3 (5)—Lease, construction of.*—*A* took a lease of certain mouzahs from *B* in dar-putni and se-putni, and covenanted to pay annually R3,191 *to the superior landlords of B direct*, and R1,800 to *B*. *A* was to take receipts from the superior landlords, make them over to *B* and take receipts from the latter. The whole amount of R4,991 was described in the lease as *annual rent fixed*, and in certain eventualities arising out of non-payment by *A* to the superior landlords, *B* was authorized to realise the amount from *A*, by bringing a suit for *arrears of rent*:—*Held*, upon a construction of the lease, that a suit brought by *B* for realisation from *A* of the amount, which the latter failed to pay to the superior landlords under the terms of the lease, was, for the purpose of the limitation, one not for rent, but for damages for breach of covenant. *Rutnessur Biswas* v. *Hurish Chunder Bose, I. L. R. 11 Calc. 221*, followed. *Basanta Kumari Debya* v. *Ashutosh Chuckerbutti, I. L. R. 27 Calc. 67*, distinguished. HEMENDRA NATH MUKERJEE *v.* KUMAR NATH ROY (1905).
I. L. R. 32 Calc. 16

LIMITATION—*concluded.*

——— *Appeal—Mesne profits, determination of—Decree—Final order—Period of limitation—Copy of decree, time for—Civil Procedure Code (Act XIV of 1882), ss. 212, 244, 312.*—When a decree for possession of a property directs an enquiry into the amount of mesne profits under s. 212 of the Civil Procedure Code, and an order is finally made determining the amount, a formal decree is necessary to be drawn up to give effect to the final order, which terminates the suit; and when the final order or decree is appealed against, the time requisite for obtaining a copy of the decree shall be excluded, in computing the period of limitation prescribed for the appeal. *Khirode Sundari Debi* v. *Jnanendra Nath Pal Chaudhuri, 6 C. W. N. 283*, distinguished. GOPAL CHANDRA CHAKRAVARTI *v.* PRONATH DUTT (1905).
I. L. R. 32 Calc. 75

——— *Accrual of the right to sue—Calcutta Municipal Act (Bengal Act III of 1899), s. 634—Rate-payers, interests of.*—As a plaintiff is debarred by cl. (1) of s. 634 of the Calcutta Municipal Act (Bengal Act III of 1899) from commencing a suit, until the expiration of one month after delivery of notice, the expression "accrual of the right to sue" in cl. (2) must apply to the date when the month's notice expired, from which date he has three months within which to commence his action. The words "accrual of the right to sue" in s. 634 of the Act do not mean accrual of the cause of action. CORPORATION OF CALCUTTA *v.* SHYAMA CHARAN PAL (1905) . I. L. R. 32 Calc. 277

LIMITATION ACT (XV OF 1877).

——— s. 4—*Rules—Records.*—The rule in s. 4 of the Limitation Act, which requires that the Court should give effect to the rules of limitation, even though limitation may not be set up in defence, applies when the point appears on the face of the record and does not stand in need of being developed. NADHU MONDAL *v.* KARTICK MONDAL (1905).
9 C. W. N. 56

——— s. 4—*Duty of Court to dismiss suit, if barred—Applicable, where Court can dismiss entire claim—Position, where portion of claim admitted.*—The obligation cast upon a Court by s. 4 of the Limitation Act to dismiss a suit, although limitation has not been set up as a defence, is only in cases where the Court is in a position to dismiss the whole claim or suit. *Alimannissa Khatoon* v. *Syed Hossein Ali, 6 C. L. R. 267*, and *Raghu Nath Singh Manku* v. *Pareshram Mahata, I. L. R. 9 Calc. 635*, followed. KANDASAMY CHETTY *v.* ANNAMALI CHETTY (1905) . . I. L. R. 28 Mad. 61

——— ss. 4, 7—*Suit by minor for declaration of invalidity of widow's alienation—Omission by father of minor to sue—Father's right to sue barred—Hindu law—Plaintiff not nearest reversioner—Maintainability—Specific Relief Act (I of 1877), s. 42—Discretion of Court to make declaratory decree.*—Plaintiff, a minor, sued for a declaration

LIMITATION ACT (XV OF 1877)—*continued*

that an alienation by a Hindu widow was invalid as against him after the death of the widow Plaintiff was not the nearest reversioner, there being certainly one and apparently two sets of reversioners, who would be entitled to take in succession before him Plaintiff's father had not brought any suit, though he could have done so, and the father's right to bring such a suit had become barred. The nearest reversioner had concurred in the improper alienation and all the reversioners nearer than plaintiff had omitted to sue and were barred from doing so by limitation They were all parties to the suit. *Held*, that the suit was not barred by limitation. Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow no one of such reversioners can be held to claim through or derive his title from another reversioner, even if that other happens to be his father, but each derives his title from the last full owner; plaintiff was therefore entitled to the benefit of s 7 of the Limitation Act There is no privity of estate between one reversioner and another as such, and consequently an act or omission by one reversioner cannot bind another reversioner, who does not claim through him. *Bhagwanta v Sukhi* I L. R. 22 *All* 53 approved. *Chhaganram Ashikaram v Bai Motigauri*, *I L R 14 Bom 512* discussed. *Held also*, that plaintiff was entitled to maintain the suit A more distant reversioner may maintain such a suit when the reversioners nearer in succession are in collusion with the widow or have precluded themselves from suing The right given by s 42 of the Specific Relief Act to bring a declaratory suit is not limited by illustration (*E*) of that section or by Art. 120 of the Limitation Act to suits by a person presumptively entitled to possession The general words of a section should not be limited to the illustrations given in the Act or by reference to the suits specially enumerated in the Limitation Act Though it was doubtful whether the lower Court should, in the exercise of its discretion, have allowed the suit to proceed, having regard to the remoteness of plaintiff's interest, the High Court made the declaration prayed for as the finding of fact was that the alienation had been made without necessity and was improper, and it might be that, when the widow should die, the plaintiff would be the presumptive reversioner and the declaration now made would save him from having to prove the impropriety of the alienation again *Per* DAVIES *J*—The declaration made in the present suit would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversioner on the death of the widow GOVINDA PILLAI v THAYAMMAL (1905) I. L. R. 28 Mad. 57

——— s 5, and Sch. II, Art. 152—*Amendment of decree—Appeal—Limitation—Sufficient cause for non presentation of appeal within time*—Where the original decree was signed on the 6th July 1903, and the plaintiffs applied, on the 22nd instant, to have the same amended in respect of the name of a party, which had been incorrectly recorded, and of the amount of the claim allowed, which had been entered as R600 instead of R1 600 and the amendment was made on the 22nd August, *Held*, that the period of limitation should be reckoned from the 22nd August as the date when the correct decree was prepared, and that an appeal filed on the 2nd September was within time. *Held further*, that under s. 5 of the Limitation Act there was sufficient cause for not presenting the appeal within thirty days from the date of the first decree AMAR CHANDRA KUNDU v. ASAD ALIKHAN (1905) . . . . I. L. R. 32 Calc 903

——— ss. 5, 7, 8, Sch. II, Art. 21—*Representatives under Act XIII of 1855 not persons entitled to sue within the meaning of s 7 nor 'joint creditors' or joint claimants within the meaning of s 8 of the Limitation Act—Construction of statute—Fatal Accidents Act (Indian) XIII of 1855—'Representative of the deceased' who are—The right under the Act is distinct in each and is a several, not joint right*—The word 'representative' in Act XIII of 1855 does not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian Under Art. 21, Sch. II of the Limitation Act, the suit must be brought within one year from death, unless the bar is saved by s 7 or 8 of the Act. The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest. *Pym v The Great Northern Railway Co*, *4 B & S. 396* The beneficiaries are in the position of joint decree-holders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply conferred on one or more of several joint decree-holders by s 231 of the Code of Civil Procedure The beneficiaries therefore are not persons 'entitled to sue' within the meaning of s. 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit. The principle in *Periasami v Krishna Ayyar*, *I L.R 25 Mad 431*, followed. They are also not joint creditors nor joint claimants under s. 8 of the Limitation Act. Joint claimants are persons whose substantive rights are indentical and not those who are permitted to enforce distinct and different rights under one judicial process. *Ahmsa Bibi v Abdul Kader Saheb*, *I L. R 25 Mad 26*, distinguished. Ss 7 and 8 of the Limitation Act must be held to apply to suits under Art 21, if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding in the absence of express words, that they do not so apply JOHNSON v. THE MADRAS RAILWAY COMPANY (1905) . . . I. L. R 28 Mad 479

——— s. 7—*Civil Procedure Code (Act XIV of 1882), s 368—Appeal by guardian, abatement of—Laches of guardian, effect of—Application on behalf of minors to restore appeal—Right*

LIMITATION ACT (XV OF 1877)—*continued.*

to apply joint and not several.—Where two majors and the guardian of two minors jointly preferred an appeal in which they were jointly interested, and on the death of the sole respondent the appeal was allowed to abate under s. 368 of the Code of Civil Procedure, the minor appellants cannot on the application of another guardian have the appeal restored and proceeded with. *Per* DAVIES, *J.*—The order of abatement under s. 368 of the Code of Civil Procedure is absolute. The minors being bound by the acts of their guardian, there was no appeal pending and the application could not be treated as an application under s. 368 of the Code of Civil Procedure to which the provisions of s. 7 of the Limitation Act might be applied, as s. 368 of the Code of Civil Procedure contemplates an appeal pending. Even if it could be so considered, the application would be barred as the minors were interested jointly with others, who laboured under no disability. *Periasami* v. *Krishna Ayyan, I. L. R. 25 Mad. 431,* followed. *Per* SUBRAHMANIA AYYAR, *J.*- On the death of respondent, the right to have his representatives added as parties vested *jointly* and not *severally* in the appellants, whatever may be the nature of their interests in the subject-matter of the appeal. *Periasami* v. *Krishna Ayyan, I. L. R. 25 Mad. 431,* followed. PERU v. VARIANGATTIL RAMAN MENON (1905) . . I. L. R. 28 Mad. 359

——— s. 7, Sch. II, Art. 149.

See LIMITATION. I. L. R. 32 Calc. 129

See MESNE PROFITS.
I. L. R. 32 Calc. 118

——— ss. 7, 9, 13, Sch. II, Art. 179, cl. (4)—*Execution of decree—Application by minor after previous application presented in time by deceased decree-holder—Minor's application beyond time—Disability—Inability.*—A decree-holder, after making various applications for execution of a decree, each of which was within time, died. His son, a minor, made an application for execution of the decree within three years of his father's death, but more than three years after the date of his deceased father's last application. *Held,* that under s. 9 of the Limitation Act (XV of 1877) the minor's application for execution was time-barred, it not being a case of initial disability, but of subsequent disability. *Per* JENKINS, *C.J.*—Inability to sue is distinct from disability, which means want of legal capacity and for the purposes of the Limitation Act (XV of 1877) is the state of being (as s. 7 indicates) a minor, insane or an idiot. A subsequent disability does not stop time that has once begun to run. *Lolit Mohun* v. *Janoky Nath, I. L. R. 20 Calc. 714,* distinguished. JIVRAJ v. BABAJI (1905).
I. L. R. 29 Bom. 68

——— s. 7, Sch. II, Art. 149—*Endowment—Cause of action—Minor sebait—Suit on attaining majority—Idol, position of—Complete and incomplete dedications—Right of sebait to sue with respect to endowed property—Succession or management of endowed property—Suit by guardian during minority, right of—Suit by lessee under Government.*—In a suit to recover possession of land it was found by both the Courts below that the dispossession on which the cause of action was based, had taken place during the minority of the plaintiff, and that the suit had been brought within three years of his attaining majority. *Held* (reversing the decision of the High Court), that the plaintiff was not deprived of the benefit of s. 7 of the Limitation Act (XV of 1877) by reason of his suing as the sebait of an idol. In dedications of the completest kind an idol is rightly regarded as a judicial person capable as such of holding property; but there are less complete endowments in which, notwithstanding a religious dedication, property descends (and beneficially) to heirs subject to a trust or charge for the purposes of religion. *Sonatan Byzack* v. *Juggutsoonderee Dossee, 8 Moo. I. A. 66,* and *Ashutosh Dutt* v. *Doorga Churn Chatterjee I. L. R. 5 Calc. 438 : L. R. 6 I. A. 182,* referred to. Even, however, in a religious dedication of the strictest character the possession and management of the dedicated property still belongs to the sebait, in whom therefore, and not in the idol, is vested the right to sue, when necessary, for the protection of the property. There being no reliable evidence as to the foundation of a religious endowment or as to its terms or conditions: *Held,* that the legal inference was that the title to the property, or to its management and control, followed the line of inheritance from the founder. *Gossami Sri Gridhariji* v. *Romanlalji Gossami, I. L. R. 17 Calc. 3 : L. R. 16 I. A. 137,* followed. Where a right of action accrues to a minor, the fact that his guardian might have maintained a suit on his behalf during his minority does not deprive him of the protection given to him by s. 7 of the Limitation Act. The sixty years' period of limitation provided by Art. 149, Sch. II of the Limitation Act is not applicable to a suit brought by a person, claiming a title under a settlement pottah from Government. JAGADINDRA NATH ROY v. HEMANTA KUMARI DEBI (1905).
I. L. R. 31 Calc. 129
s.c. L. R. 31 I. A. 203

——— ss. 7, 9 and Sch. II, Arts. 142, 144—*Cause of action accruing to an infant Hindu widow—Adoption by her—Suit by adopted son—Putni Sale Law (Reg. VIII of 1819).*—Where a cause of action in respect of a claim for possession of land by right of purchase at a *putni* sale, accrued to an infant Hindu widow, who adopted a son during the continuance of her minority: *Held,* that the adopted son (an infant) in bringing a suit, when no suit had been brought by the widow, was entitled to the benefit of s. 7 of the Limitation Act. HAREK CHAND BABU v. BEJOY CHAND MAHATAB (1905).
9 C. W. N. 795

——— ss. 7, 17, Sch. II, Art. 106—*Limitation Act—Suit for partnership account and share of partnership assets—Good-will and trade-marks, if assets—Minority of plaintiff—Right to sue, accrual of to administrator pending minority*

LIMITATION ACT (XV OF 1877)—continued

—*Effect*—A suit by the he r of a deceased partner against the surv ving partner for an account and share of the deceased in the partnership assets including the good will and trade marks of the partnership business, comes w thin the class of su ts dealt w th under Art. 106 of Sch II of the Lim ta tion Act The fact that the a were unrealised as ets outstanding at the death of the deceased partner wh ch s ere still outstanding at the date of the su t would not alter the nature of the su t S " of the Limi ation Act must be read in conjunct on wi h s 17 and the operat on of the earlier sect on must be regarded as qual fied by and subject to the except on prescribed by the late section. *R rell Carnac v Gokuldas I L R 20 Bom 15* fol owed *Bhag wandas v It rell Carnac 3 C W* \ *156 s c I L R 23 Bom 549*; and *Jogad adra Nath Ray v Hemanta Kumari Deb S C W N 609 s c L R 31 I A 203* referred to *A* a partner of *B* died intestate in 1896 leaving a w dow an l infant sons The w dow took out letters of adm n stra on to *A s* estate on the 29th of June 1896 l m ted during the minority of the infants The eldest son attained majo ty on the 21st of February 1903 and in t tuted the present su t on the 19th May 1904 n behalf of himself and his inf nt brothers for an account and share of the profits of the dissolved partnersh p *Held* that the suit was barred by limit t on. MOHIT LALL DUTT v. RAY NARAIN DUTT (1905) 9 C W N 537

———— s. 9

See s. 7 9 C W N 795

———— s 10 Art. 48.

See LIMITATION I L. R. 32 Calc. 799

———— s 10 Art. 48—*Negot able Instruments Act (XXVI of 1881) ss 9 59 Fund n Court Secretary of State and Court officers f trustees—Fo ged endo sement on Government Prom s o y notes—Holder in due course—Defect of t t e of holder*—By a consent dec ee dated 1809 certain Government promissory notes valued at R60 00J were paid into Court for the benefit of *X* and others, *X* died in 1834, leav ng two sons both of whom afterwards d ed unmarr ed. Subsequently *Y* ap plied for a subdivis on of the notes which was done by the Registrar of the Sudder Dewan Adalut Thereafter one of the notes was lost *Y* died w th out issue but left two widows, *A* and *B* In 1885 *A* and *B* brought a su t against the Registrar to re cover the lost note, and the Registrar was directed to recover and retain the lost note The Registrar then stopped he c rculation of the note, and from an enquiry made at the Comptroller General s office ascertained that the note stood in the name of *C* *A* subsequently died in 1894 and afterwards in 1898 *B* brought the present suit against the Registrar Secretary of State and *C* alleging fraud on the part of the servants of the Comptroller General s office *Held* that the Government was not a trustee for B and that the negligence committed by the Comptroller General in 1833 was barred by limita t on. *Hansraj v Rutton I L R 24 Bom. 65* d st nguished CHANDRA KALI DABEE v. E P CHAPMAN (1905) I L. R. 32 Calc 799 s.c 9 C W N 443

———— s 10—*Liab l ty to account—Maho medan law—Trust—Will—Testamentary docu ment—Trustee de son tort—Express trustee.*—*Held* that if express trusts are created by deed or will and some third party takes upon h mself the administrat on of the trust property he becomes a trustee *de son t rt* and, as such, is bound to account as f he were the r ghtful trust e a d l m.tat on will not run in his fa our under s. 10 of the Limitation Act (XV of 1877) MOOSABHAI v. YACOOBBHAI (1905) I. L. R. 29 Bom. 267

———— s. 12—*T me requ s te for obta n ing copy of the decree*—In computing the period of limitation for an appeal a party applying to the lower Court for a copy of the decree on the day it re opened after the holidays, is not entitled to deduct as t me requisite for ol ta ning a copy of the decree, the period during wh ch the lower Court was closed when he could have made such appl cat on before the Court closed and when on the day he actually appl ed the per od l m ted for appeal had exp red. *Tukaram Gopal v Pandurang Sadaram I L R 23 Bom 591* referred to and distinguished. *Pandha r nath v Shankar I L R 23 Bom 556* referred to and distinguished VENKATA LOW v. VENKATA CHELLA CHETTY (1905) I. L. R 28 Mad 452

———— s 14

See CIVIL PROCEDURE CODE, s 13.

———— s. 14, Sch. II Art 109—*Limita t on—Res jud ca a—Past and future mesne profits—Profits prev ous su t for—C v l Procedure Code (Act XIV of 1882) s 13 Expl III*—For the purpose of lim tat on mesne profits must be regarded as accruing due from day to day unless shown to fall due otherwise so that all mesne profits due for the per od antecedent to the three years previous to the inst tution of the su t are barred *Tha kore Dass Roy Chowdhry v Nobin Krista Ghose 23 W R 126* distinguished. *Abas v Fass h-ud-d n I L R 24 Calc 413*, referred to S 14 of the Lim ta tion Act does not entitle a plaintiff in a subsequent suit for mesne p ofits to a deduct on of the period during wh ch his previous suit was pending when the Court in the previous su t did not pass a decree for mesne profits subsequent to the inst tution of the suit, e ther through inadvertence or because the cla m was not especially pressed. *Deo Prosad S ng v Partab Ka ree I L R 10 Calc 86*; *Hem Chandra Chowdhry v Kal Prosanna Bhaduri I L R 30 Calc 1033 Sheth Kahandas Naranadas v Dah a bha I L R 3 Bom. 182*; and *Patala Mahala v Tulja I L R 8 Bom 223* dist nguished. S. 13 of the Civil Procedure Code does not bar a su t for mesne profits, which was claimed in a previous

LIMITATION ACT (XV OF 1877)—*continued.*

suit between the parties, but in regard to which the decree was silent, the mesne profits claimed in the second suit being a period subsequent to the institution of the first suit. *Mon Mohun Sirkar* v. *The Secretary of State for India, I. L. R. 17 Calc. 968; Ram Doyal* v. *Madan Mohan Lal, I. L. R. 21 All. 425; Bhibhrav* v. *Sitaram, I. L. R. 19 Bom. 532;* and *Ramabhadra* v. *Jagannatha, I. L. R. 14 Mad. 328,* followed. G. S. HAYS v. PADMANAND SINGH (1905) . . . . I. L. R. 32 Calc. 118

——— s. 14, Sch. II, Art. 109.

See MESNE PROFITS.
I. L. R. 32 Calc. 118

——— s. 17.

See s. 7 . . . 9 C. W. N. 537

——— *Suit to set aside putni lease—Regulations II of 1803 and II of 1805—Putni—Limitation Act (XIV of 1859)—Alienation by Hindu manager—Legal necessity.*—In 1837 a putni lease of a portion of a zamindari was granted to the predecessors of the defendants by a male owner's widow, who had at the time no estate in the property, but was acting as manager for *B*, the widow of her adopted son, who was then the legal owner, and it was recited in the deed that the consideration money was to pay the Government revenue then due. *B* in 1846 adopted a son, who was the father of the plaintiff, and who attained his majority in 1856 and died in 1880. By ekrars made between her adopted son and *B* she was allowed to remain in possession of the property in suit for her life. The grantor of the putni lease died in 1843 and *B* died in 1894. *Held,* by the Judicial Committee (affirming the decision of the High Court) that a suit brought in 1897 to set aside the putni lease was barred. If it was void the period of limitation ran from the date on which it was granted; if it was voidable only by *B's* successor the right of action arose on his adoption, and time would begin to run against him from the date when he attained his majority in 1856. BONOMALI ROY v. JAGAT CHANDRA BHOWMICK (1905).
I. L. R. 32 Calc. 668

——— s. 19.

See BENGAL TENANCY ACT, SCH. III, ART. 6 . . 9 C. W. N. 1073

——— s. 19—*Acknowledgment of debt—Hat-chita, entry in—Signature, what is sufficient—Customary mode—Intention of parties.*—Where at the foot of certain entries made in a *hat-chita,* which bore at its top the debtor's name and signature, the debtor wrote the words *likhitan khode* (writer's self). *Held,* that this was the mode adopted by the debtor of signing the *hat-chita,* and as it appeared that it was the debtor's intention thereby to acknowledge a debt, the entry constituted an acknowledgment within the meaning of s. 19 of the Limitation Act. It is necessary in such cases to consider the intention of the parties. *Gungadhar Rao* v. *Shidramapa, I. L. R. 18 Bom. 586,* applied. *Andarji Kalyanji* v. *Dulabh Jeevan, I. L. R. 5 Bom. 88; Jekishan Bapuji* v. *Bhowsar Bhoga Jetha, I. L. R. 5 Bom. 89; Brojender Coomar* v. *Bromomoyee, I. L. R. 4 Calc. 885,* referred to. SADASOOK AGARWALLAH v. BAIKANTHA NATH BASUNIA (1905) . . . . . 9 C. W. N. 83

——— ss. 19, 20—*Mortgage—Acknowledgment of debt—Acknowledgment by predecessor in interest—Part payment of interest.*—*A* mortgaged several properties to the plaintiffs and then sold one of them, property No. 3, to *B*, who again mortgaged the property to *C* and in a mortgage suit by *C* the property was sold and purchased by *D*. *A* afterwards paid part of the principal as well as of interest under the mortgage and made acknowledgment of his liability under it. *D* contended that any such acknowledgment as against her was of no avail. *Held,* that under ss. 19 and 20 of the Limitation Act the acknowledgment as well as the payments were sufficient to keep the debt alive against the property No. 8. *Chinnery* v. *Evans, 11 H. L. C. 115,* referred to. KRISHNA CHANDRA SAHA v. BHAIRAB CHANDRA SAHA (1905).
I. L. R. 32 Calc. 1077
9 C. W. N. 868

——— s. 22.

See PARTY . . 9 C. W. N. 42

——— s. 22—*Substitution after claim barred—"New plaintiff"—Civil Procedure Code (Act XIV of 1882), s. 372.*—*A* instituted a suit on the last day of limitation. On a subsequent date, *B's* name was substituted in place of *A's* upon an application of *B*, to which *A* consented, stating that *A* had sold his interest to *B*. Later on, *A* and *B* both representing that the alleged sale was a fictitious transaction, *A's* name was restored and *B's* struck out. Both the lower Courts found that *B* was not the *benamdar* of *A*. *Held,* that the second substitution order could not have been made under s. 372 of the Civil Procedure Code and at its date *A* was a "new plaintiff" within the meaning of s. 22 of the Limitation Act. The suit was therefore barred. RAMJOY NATH SARCAR v. SHAMBHU NATH SHAHA (1905) . . . . 9 C. W. N. 883

——— s. 24—*Calingula constructed by Government—Necessary effect to cause water to flood plaintiff's lands—Rights of Government in connection with the distribution of water—Continuing wrong.*—In 1882 a calingula was constructed by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory

LIMITATION ACT (XV OF 1877)—*continued*

injunction directing that the calingula be blocked up *Held*, that they were entitled to the relief claimed Government have the right to distribute the water of Government channels for the benefit of the public subject to the rights of a ryotwari landholder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements But the rights of Government, in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect, is desirable in connection with the general distribution of water for the public benefit The fact that the opening of the calingula was necessary for the protection of the tank, and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected Even if Government had been empowered by statute to construct the calingula in question it would be for Government to show that they could not exercise their statutory powers without injuring the plaintiff's lands The position of persons acting under statutory authority discussed *Held, also*, that the injury was a continuing one and that the suit was governed by s 24 of the Limitation Act and was not barred by limitation SANKARAVADIVELU PILLAI v SECRETARY OF STATE FOR INDIA IN COUNCIL (1905)
I. L. R 28 Mad. 72

——— Sch. II, Art 11
See LIMITATION . I. L. R 32 Calc 537

——— Sch. II, Art 11—*Claim to attached property—Investigation of claim—Civil Procedure Code (Act XIV of 1882), ss 278 281 and 283—Waqf property*—Where a Court rejects a claim to attached property by reason of the claimant having failed to adduce any evidence in support of his claim, notwithstanding that he was allowed an opportunity to do so, the order rejecting the claim is one properly made under s. 281 of the Civil Procedure Code, and is conclusive as between the parties, if no suit is brought within one year to establish the claim, as contemplated by Art. 11, Sch. II to the Limitation Act (XV of 1877) *Kallar Sing v Toral Mahton*, 1 C W N 24 distinguished, and *Sardhari Lal v Ambica Pershad*, I L R 10 Calc 521; L R 15 I A 123, referred to RAHIMBUX v ABDUL KADER (1905)
I. L. R. 32 Calc. 537

——— Sch. II, Arts 12, 144, 148
See SALE IN EXECUTION OF DECREE
I. L R. 32 Calc 296

See NEW TRIAL, APPLICATION FOR
I L R 32 Calc. 339

——— Sch. II, Art. 14.
See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF . I. L. R. 32 Calc. 1107

LIMITATION ACT (XV OF 1877)—*continued*

——— Sch. II, Art. 14.
See LIMITATION I. L. R. 32 Calc. 716

——— Sch. II, Art. 14—*Executive Government—Ultra vires order—Nullity*—Art. 14 of Sch. II of the Limitation Act is applicable to acts or orders done in the exercise of powers legally exercisable by the executive, subject to conditions the fulfilment of which is denied by the party impugning the act or order, or invested with no finality by the empowering enactment. An order which is entirely *ultra vires* of the Executive Government is a mere nullity and no suit is necessary to set it aside. BALVANT RAMCHANDRA v SECRETARY OF STATE (1905) . I. L. R. 29 Bom. 480

——— Sch. II, Art. 14—*Estates Partition Act (Bengal Act VIII of 1876), s 116—Suit for possession*—In a partition proceeding, a dispute arose as to whether certain plots of land were included in the property to be partitioned or not An enquiry was made by a Special Deputy Collector, who made a report to the Collector holding the partition proceedings The Collector passed an order on the 9th August 1893 under s. 116 of the Estates Partition Act, directing that the partition proceedings be struck off. On the 19th January 1897, the plaintiffs brought a suit for declaration of their title to the said disputed plots of land and to recover possession thereof On an objection by the defendants that the suit, not having been brought within one year from the date of the order of the Collector, was barred by limitation. *Held* that Art. 14, Sch II of the Limitation Act (XV of 1877) did not apply to the case, and that the suit was not so barred. *Parbati Nath Dutta v Raymohun Dutta*, *I L R 29 Calc 367*, distinguished. RAI CHANDRA ROY v FAZLUDDIN HOSSEIN (1905)
I. L. R. 32 Calc 716

——— Sch II, Arts. 29, 36—*Suit for damages—Fictitious distress—Standing crops—Immoveable property*—The defendants, under fraudulent and fictitious proceedings of distraint between a fictitious landlord and a fictitious tenant, seized standing crops belonging to the plaintiff—*Held*, that a suit for damages for the crops so seized not being specially provided for in the Act, is governed by Art. 36 of Sch. II of the Limitation Act (XV of 1877) Standing crops are immoveable property within the meaning of the limitation Act. HARI CHARAN FADIKAR v HARI KAR (1905) . I. L. R. 32 Calc 459
s c. 9 C. W. N. 378

——— Sch. II, Art. 48
See s 10 . . 9 C. W. N. 443

——— Sch. II, Art. 49
See CIVIL PROCEDURE CODE, s 13.
9 C. W. N. 679

——— Sch. II, Art. 35—*Applicability to Hindus—Suits for restitution of conjugal right—*

LIMITATION ACT (XV OF 1877)—*continued.*

Starting point of limitation for.—A suit brought by a Hindu or Mahomedan husband against his wife for restitution of conjugal rights is barred under Art. 35, Sch. II of the Limitation Act, if brought more than two years after the time when he demanded restitution and was refused. *Dhanjibhoy Bomanji* v. *Hirobai, I. L. R. 25 Bom. 644, 646,* followed. *Binda* v. *Kaunsilia, I. L. R. 13 All. 126,* dissented from. SARAVANAI PERUMAL PILLAI v. POOVAYI (1905) . . I. L. R. 28 Mad. 436

——— Sch. II, Arts. 44, 144—*Suits for cancellation of deed of sale and for possession.*—A suit for cancelling a deed of sale executed by the plaintiff's guardian on the ground of fraud and misrepresentation and for recovery of possession of the properties comprised therein, falls within Art. 44 and not within Art. 144 of Sch. II of the Limitation Act. *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26,* distinguished. *Kamakshi Natakan* v. *Ramasami Nayakan, Second Appeal No. 929 of 1895, unreported,* distinguished. RANGA REDDI v. NARAYANA REDDI (1905) I. L. R. 28 Mad. 423

——— Sch. II, Art. 49—*Wrongfully removing specific property—Mortgage—Mortgage of interest in tenancy in common by one of two co-tenants—Deterioration of mortgagor's interest by act of other co-tenant—Suit for damages by mortgagee against wrong-doer—Maintainability.*—*K,* who was a tenant in common with the defendant, mortgaged her interest to the plaintiff. The plaintiff instituted a suit against *K* for the recovery of the mortgage amount by sale of the mortgaged property. Pending the appeal in that suit, the defendant cut down all the trees on the land and appropriated the same to himself. On the sale of *K's* interest in the land which took place after the removal of the trees, the plaintiff realised only a portion of the decretal amount. The mortgagee now instituted the present suit against the defendant for the damage suffered by him by reason of the defendant having appropriated *K's* share of the wood. The suit was filed within three years of the act complained of. *Held,* that the suit was maintainable. From the time of lending his money, the mortgagee, whether in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior. *Held also,* that the suit was not barred by limitation. It was not the act of cutting down the timber, but the subsequent appropriation of the wood by the defendant, which ought to have been left for the share of the mortgagor, that operated to the injury of the plaintiff. Limitation began to run from the date when the defendant appropriated the wood to himself. AIYAPPA REDDI *v.* KUPPUSAMI REDDI (1905) . . . . I. L. R. 28 Mad. 20

——— Sch. II, Art. 62—*Suit for money received by defendant for plaintiff's use.*—*B* received from *C* money due from him on two deeds of mortgage. *A,* who was entitled to a share of the money, instituted a suit for recovering his share from *B* more than three years after the receipt of the money by *B. Held,* that the money was received by *B* for *A's* use and that therefore the suit was governed by Art. 62 of Sch. II of the Limitation Act (XV of 1877), and not by Art. 120. *Nund Lall Bose* v. *Meer Aboo Mahomed, I. L. R. 5 Calc. 597,* and *Gurudas Pyne* v. *Ram Narain Shaw, I. L. R. 10 Calc. 860,* distinguished. MAHOMED WAHIB v. MAHOMED AMEER (1905). I. L. R. 32 Calc. 527

——— Sch. II, Arts. 89, 120.

See PRINCIPAL AND AGENT.

I. L. R. 32 Calc. 719

——— Sch. II, Art. 91.

See HINDU LAW . 9 C. W. N. 636

——— Sch. II, Art. 91—*Suit to set aside an instrument—Collusive sale deed not intended to be acted upon—Specific Relief Act (I of 1877), s. 39.*—A suit to cancel or set aside an instrument must, under Art. 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The plaintiff on 1st June 1895 executed a sham sale deed in favour of the defendants, neither party intending that it should be acted upon. The defendants in February 1899 began to set up a claim to ownership on the strength of the deed. On 3rd August 1900, plaintiff brought this suit. On its being contended that the suit was barred by limitation:—*Held,* that the suit was not barred having been brought within three years from the date when the plaintiff apprehended that the defendants had set up a title under the instrument. The facts, which would entitle a person to bring such a suit, are stated in s. 39 of the Specific Relief Act (I of 1877). SINGARAPPA v. TALARI SANJIVAPPA (1905) I. L. R. 28 Mad. 249

——— Sch. II, Art. 93.

See CIVIL PROCEDURE CODE, S. 13.

——— Sch. II, Art. 106—*Hindu Law—Partnership with manager of joint family—Death of manager, effect of—Joint family and joint family business, nature of—Partner, right of, to sue for particular assets after suit for general account barred.*—Where *K,* the manager of a joint Hindu family, enters into a partnership for the family benefit with *S,* a stranger to the family, the partnership is dissolved on the death of *K,* in the absence of any agreement with the survivors. How far a joint Hindu family resembles a corporation sole and how far a joint family business resembles a partnership considered. *Samalbhai Nathubai* v. *Someshvar Mangal and Harkisan, I. L. R. 5 Bom. 38,* referred to. Although a suit for general account of a partnership will be barred under Sch. II, Art. 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share

LIMITATION ACT (XV OF 1877)—*continued*

of any particular assets received by a partner after such dissolution, if such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable *Mercanji Hormusji v Rustomji Burjorji*, *I L R 36 Bom. 628*, and *Knox v Gye*, *L R 5 H L. 656*, followed SOKKANADHA VANNIMUNDAR ROW v SOKKANADHA VANNIMUNDAR (1905) . . . I L R 28 Mad. 344

——— Sch. II, Art. 116

See CIVIL PROCEDURE CODE, s 13
9 C. W. N. 678

——— Sch. II, Art. 118.

See ART 141 . 9 C. W. N. 223

See HINDU LAW . 9 C. W. N. 638

——— Sch. II, Arts. 118, 141—*Suit to recover immoveable property on the death of Hindu widow—Adoption, validity of, collaterally involved—Limitation—Conflict of decisions.*—A suit by reversioners for the recovery of immoveable property on the death of a Hindu widow is governed by Art. 141 and not by Art. 118 of Sch II of the Limitation Act, even though a question as to the validity of an *anumatipatra* executed in favour of the widow and of an adoption made under it be involved in such suit *Ram Chandra Mukerjee v Ranjit Singh*, *4 C W N 405 ex I L R 27 Calc 242*, followed. IN THE MATTER OF DINENDRA NATH MULLICK (1905) 9 C W. N. 222

——— Sch. II, Art. 122.

See INSOLVENCY 9 C W. N. 952

——— Sch. II, Arts. 124, 141—*Claim for the recovery of an hereditary office—Succession by Hindu widow to trusteeship of temple—Alienation by widow of temple property—Suit to declare alienation invalid and not binding on those entitled to succeed the widow as trustees after her death—Bar by limitation*—A temple was built and dedicated to the public by one *Jagayya*, who acted as trustee of it during his lifetime. He died childless and his widow succeeded him as trustee She continued to manage the affairs of the temple until October 1885, when she transferred the right of trusteeship together with certain temple properties to the first defendant In 1897 the widow died. The plaintiffs as the persons entitled to be trustees in succession to her brought this suit in December 1900, to establish their rights as trustees and to have the transfer in favour of the first defendant declared invalid —*Held*, that the suit was barred under Art, 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their rights as trustees, which right had ceased to exist through the operation of the Law of Limitation. *Gnanasambanda Pandara Sannadhi v Vela Pandaram*, *I. L. R 23 Mad 271*, referred to. The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow, notwithstanding the fact that they were not her heirs in the strict sense of the word. PYDIGANTAM JAGANNADHA ROW v RAM DOSS PATNAIK (1905) I. L. R 28 Mad. 197

——— Sch. II, Art 132.

See MORTGAGE . . 9 C. W. N. 989

——— Sch II, Art. 132—*Suit for contribution from co-sharer for money paid for Government revenue, limitation for—Plaint presented as a pauper petition within time and full stamp subsequently paid—Suit instituted when plaint presented and not when Court fee is paid*—A co-sharer paying Government revenue due on land has a charge on the land for the amount so paid to the extent to which he is entitled to contribution from the other share holders and the period of limitation to enforce such charge is 12 years under Art. 132 of Sch. II of the Limitation Act. *Rajah of Vizianagram v Rajah Satrucherla Somasekhara raz*, *I L R 26 Mad 686*, *780*, followed. When a plaint is presented as a pauper petition and before disposal of the petition the full stamp duty is paid after the period of limitation, the suit, in the absence of fraud, will be considered as instituted on the day the plaint was presented and the subsequent payment of stamp duty will relate back to the date of presentation of the plaint. *Stuart Skinner* alias *Nawab Mirza v. William Orde*, *I L R 2 All. 241*, followed. ALAVAKAMMAL v SUBBARAYA GOUNDAN (1905) . . I L R 28 Mad 493

——— Sch II, Art. 141.

See LIMITATION . I L R. 32 Calc. 165

——— Sch. II, Art. 141—*Cause of action, accrual of—Adoption—Reversioners, suit by—Hindu widow, alienation by—Minority, evidence of*—A Hindu widow alienated certain immoveable property belonging to her husband's estate, and after the alienation adopted *K* in the year 1857, who died in 1862 after attaining majority, leaving his widow *S*, who succeeded him. *S* died in 1899, and the plaintiffs, as reversionary heirs of *K*, instituted this suit for setting aside the alienation and establishing their right —*Held*, that the present suit was barred by the law of limitation, the cause of action having accrued to the adopted son *K* during his lifetime and that Art, 141, Sch. II of the Limitation Act (XV of 1877) did not govern this case *Govinda Nath Roy v Ram Kanai Chowdhury*, *24 W. R. 183*, and *Prosanna Nath Roy v Afzolonnessa Begum*, *I L. R. 4 Calc 523*, doubted. *Lakshman v Radhabai*, *I L. R 11 Bom 609*; *Nathaji Krishnaji v Hari Jogoji*, *8 Bom. H C. 67*; *Moro Narayan v Balaji Raghunath*, *I L. R 19 Bom 509*, and *Bijoy Gopal Mukherji v Nil Ratan Mukerji*, *I L R 30 Calc 990*, referred to AMRITA LAL BAGCHI v JATINDRA NATH CHOWDHURY (1905) I. L. R. 32 Calc. 165

——— Sch II, Arts 142 and 144—

See CIVIL PROCEDURE CODE, s 13

LIMITATION ACT (XV OF 1877)—*continued.*

——— **Sch. II, Arts. 142, 144**—*Res judicata—Findings necessary to support decree—Limitation Act (XV of 1877), s. 14—'Unable to entertain suit'—'Other causes of a like nature'—Dismissal of previous suit for non-joinder—Possession under decree subsequently reversed—Sch. II, Art. 93.*—An appellate decree on judgment operates by way of estoppel as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings. A plaintiff is not entitled under s. 14 of the Limitation Act to exclude the time spent in prosecuting a previous suit when such suit was dismissed for non-joinder on findings arrived at after trial and not without trial, because the Court was unable to entertain the suit. Under Art. 142, Sch. II of the Limitation Act limitation runs from the date of dispossession, and no fresh starting point is given because the party dispossessed subsequently obtains possession under a decree and is ousted from possession when the decree is reversed. *Sayad Nasrudin* v. *Venkatesh Prabhu, I. L. R. 5 Bom. 382*, followed. *Degumbery Dossee* v. *Rajah Anundnath Roy, W. R. (1864), 45; Firingee Sahoo* v. *Sham Manjhee, 8 W. R. Civil Rule 373*, and *Dagdu* v. *Kalu, I. L. R. 22 Bom. 733*, referred to. Sch. II, Art. 93, does not apply when the suit is substantially for possession of property, though the plaintiff avers that an instrument relied on by the defendant is a forgery. *Sundaram* v. *Sithammal, I. L. R. 16 Mad. 311*, and *Abdul Rohim* v. *Kirparam Daji, I. L. R. 16 Bom. 186*, followed. NARAYANAN CHETTY v. KENANAMMAI ACHI (1905) . I. L. R. 28 Mad. 338

——— **Sch. II, Art. 142**—*"Possession," "dispossession," meaning of—Dispossession in execution of decree under s. 9, Specific Relief Act (I of 1877)—Wrongful possession—Civil Procedure Code (Act XIV of 1882), s. 544—Appeal—Common ground—Death of one of several appellants—Legal representatives not brought on record—Partial reversal of decree.*—When a plaintiff's title is once established his possession however obtained would be possession within Art. 142 of Sch. II of the Limitation Act. The plaintiffs, who had been dispossessed by the defendants of some lands appertaining to their taluk, forcibly dispossessed the defendants, until the latter recovered possession in execution of a decree under s. 9 of the Specific Relief Act. The plaintiffs brought the present suit for recovery of possession within 12 years from their dispossession in execution of the decree, but more than twelve years after the original dispossession. *Held* (affirming MITRA, J.)—That the suit was not barred by limitation. *Golam Nabee* v. *Bissanath Kar, 12 W. R. 9; Prem Chand Kybutta* v. *Haridas Kybutta, 22 W. R. 259; Tarabanu* v. *Abdul Gafur Chowdry, 12 C. L. R. 486*, not followed. *Lillu bin Raghu Sett* v. *Annaji Parashram, I. L. R. 5 Bom. 387; Bandu* v. *Naba, I. L. R. 15 Bom. 238*, approved. *The Trustees, Executors and Agency Company, Limited* v. *Short, L. R. 13 App. Cas. 793; The Secretary of State for India in Council* v. *Krishnamoni Gupta, 6 C. W. N. 617: s.c. I. L. R. 29 Calc. 518*, referred to. PROTAP CHANDRA CHATTERJEE v. DURGA CHARAN GHOSE (1905) 9 C. W. N. 1061

LIMITATION ACT (XV OF 1877)—*continued.*

——— **Sch. II, Arts. 142, 144.**

See s. 7 . . . 9 C. W. N. 795

——— **Sch. II, Art. 149**—*Decree in the alternative, legality of—Raiyatwari tenure—Grant of bed of tidal and navigable river on raiyatwari tenure—Power of Government to determine such tenure.*—Land forming the bed of a tidal and navigable river is the absolute property of Government. Where Government has for a long time been collecting revenue and special cesses from the occupant thereof, it will be presumed that such land was granted on raiyatwari tenure and the occupier will be entitled to hold the land so long as he pays the revenue; and he can be ousted only under the provisions of Madras Act II of 1864. Where the assignees from the Secretary of State join him as a co-plaintiff with themselves in a suit, the period of limitation will not be 60 years under Art. 149, Sch. II of the Limitation Act; such article applying only to suits brought on behalf of the Secretary of State. The only parties entitled to a decree in such a suit will be the assignees; and a decree in the alternative cannot be passed in favour of the Secretary of State or the assignees, when the right of the assignees is admitted. PULLANAPPALLY SANKARAN NAMBUDRI v. VITTIL THALAKAT MUHAMMAD (1905).

I. L. R. 28 Mad. 505

——— **Sch. II, Art. 175.**

See CIVIL PROCEDURE CODE, s. 371.

9 C. W. N. 369

——— **Sch. II, Arts. 175 (c), 178**—*Art. 175 (c) applies to applications made in second appeals as well as first appeals—Civil Procedure Code (Act XIV of 1882), ss. 368, 582, 587.*—S. 587 of the Code of Civil Procedure authorises an application to bring in a plaintiff-respondent in second appeals and extends to such appeals the provisions of ss. 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under ss. 368 and 582 and for the purposes of limitation fall under Art. 175 (c) of Sch. II of the Limitation Act and not under Art. 178. VAKKALAGADDA NARASIMHAM v. VAHIZULLA SAHIB (1905).

I. L. R. 28 Mad. 498

——— **Sch. II, Art. 178**—*Obstruction to execution—Removal by decision in favour of decree-holder—Decree-holder's right to move the Court—Application to be regarded as a continuation of previous application.*—A mortgage decree was obtained against the counter-petitioner on 28th February 1894. On 16th May 1895, the decree-holder assigned the decree to petitioner, who applied for execution on 6th December 1897. That application was struck off, and so was one which followed it. On 15th June 1898, petitioner again applied for

LIMITATION (ACT XV OF 1877)—*continued*

execution, but counter petitioner contended that the assignment was for his benefit and that, in consequence, petitioner was not entitled to execute the decree The District Munsif held an enquiry under s. 232 of the Civil Procedure Code and dismissed the application, being of opinion that counter-petitioner's contention was true Petitioner thereupon brought a suit to establish her claim that the assignment was for her own benefit. On 20th February 1901, the Appellate Court declared that petitioner had obtained a valid assignment of the decree and was entitled to execute it. On 24th November 1902, petitioner filed the present execution petition On the question of limitation being raised —*Held*, that the petitioner's right to execute the decree was not barred by limitation on 24th November 1902 The application should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed, as a competent Court has declared. Article 178 was, therefore, applicable, and time had begun to run from the date of the appellate decree declaring petitioner's right to execute, dated 20th February 1901 *Narayana Nambi v Pappi Brahmani*, *I L R 10 Mad 22 overruled.* SUBBA REDDIAR v AYYDAI AMMAL (1905) I. L. R. 28 Mad. 50

——————Sch. II, Art. 178—*Appeal—Order refusing application for appointment of commissioner to effect division of property by metes and bounds in partition suit.*—The parties to a suit for partition entered into a compromise which was recorded by the Court and by which their respective shares in the family property were agreed upon An application was subsequently made for the appointment of a commissioner to effect an actual division of the property, but the Subordinate Judge dismissed it on the ground that the right to claim further relief in the matter had become barred by limitation This order was reversed on appeal and the case was remanded by the District Judge for disposal according to law An appeal was then preferred to the High Court against the order of remand when it was contended that no appeal lay to the District Judge against the order of the Subordinate Judge —*Held*, that an appeal lay The order of the Subordinate Judge on the face of it purported to decide a question to be dealt with under s 244 of the Code of Civil Procedure and was therefore a decree within the meaning of that term in the Code, and that the party against whom it was passed was entitled to appeal therefrom Even if there was no decree to be executed, and the Subordinate Judge erroneously supposed the matter to be one in execution, and held the application to be barred, such usurpation of jurisdiction could not make the order passed in consequence thereof less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed. *Hurrish Chander Chowdry v Kali Sundari Debia*, *L. R 10 I A 4*, and *Abdul Rahiman Saheb v Ganapathi Reddi*, *I L R 23 Mad. 517*, followed. Such an application is not an application of the description

LIMITATION ACT (XV OF 1877)—*continued*

contemplated by Art. 178 (LAKSHMANAN CHETTY v RAMANATHAN CHETTY (1905).

I. L. R. 29 Mad. 127

——————Sch. II, Art. 179—*Suspension of execution proceedings—Revival of pending execution suspended by or on default of the decree-holder.*—On 24th August 1888 an application was made for execution of a decree, and on 18th December 1888 execution was allowed to proceed. On 19th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December an order was made that, as the decree-holder had not made a deposit on account of the transfer to the Collector, "therefore in default of prosecution on the part of the decree-holder, the record be not sent to the Collector's Court" On 15th February 1889 an appeal had been preferred to the High Court from the order of 18th December 1888 allowing execution to proceed and the High Court reversed that order on 7th January 1890, but on appeal to the Privy Council the order allowing execution was restored on 12th December 1894 *Held*, by the Judicial Committee (affirming the decision of the High Court) that an application for execution made on 23rd November 1887 was one to revive and carry through a pending execution suspended by no act or default of the decree-holder, and not an application to initiate a new one, and was therefore not barred by limitation The order of 29th November 1889 was one in aid of execution and that of 23rd December was in no sense a final order; if the appeal from the order of 18th December 1888 and the proceedings up to the order of the Privy Council of 12th December 1894 had not intervened there was nothing in its terms to preclude the decree-holder from coming again to the Court and, after satisfying the conditions indicated in the order, obtaining the transmission of the case to the Collector's Court. HAMID UD-DIN AHMAD v JAWAHIR LAL (1905)

I. L. R. 27 All. 334
L. R. 32 I. A. 102

——————Sch. II, Art. 179—*Step in aid of execution—Application by decree-holder purchaser for confirmation of sale, if—Civil Procedure Code (Act XIV of 1882), s. 312*—An application by a decree-holder, who has purchased a property in execution of his own decree for confirmation of sale, is not an application to take some steps in aid of the execution of the decree within the meaning of Art. 179, Sch. II of the Limitation Act. UMESH CHANDRA DAS v. SHIB NARAIN MONDUL (1905).

9 C. W. N. 195

——————Sch. II, Art. 179—*Application for execution not accompanied by copy of decree sufficient to save bar—Step in aid of execution—Construction of statute.*—An application for execution presented on behalf of a party entitled to present it, but not accompanied by a copy of the decree as required by the Civil Rules of Practice, is an application "in accordance with law, within the meaning of Art. 179 Sch. II of the

LIMITATION ACT (XV OF 1877)—*continued.*

Limitation Act, as the defect has reference only to an extraneous circumstance. *Sadashiva Raghunath* v. *Ramachandra Chintaman*, 5 *B. L. R. 394*, dissented from. The provisions of the Limitation Act should receive a fair and not too technical construction. Observations on the construction of statutes. Where the decree is more than one year old and the application prays for the issue of notice under s. 248 of the Code of Civil Procedure to the judgment-debtor, such application in the absence of any provisions prescribing the form, contents or accompaniments of an application for issuing notice, will be a step in aid of execution within the meaning of Art. 179, Sch. II of the Limitation Act. PACHIAPPA ACHARI v. POOJALI SEENAN (1905) . I. L. R. 28 Mad. 557

———Sch. II, Art. 179—"*Application in accordance with law*"—*Application by guardian on behalf of one found to be a major at the time*—*Jurisdiction of Court to review its own order, when an appeal lay.*—An application for execution made by *A* as guardian on behalf of *B*, who was a major at the time the application was made, is not an "application in accordance with law" within the meaning of Art. 179, Sch. II of the Limitation Act, and will not operate as a bar to limitation, though it may perhaps be a good application for other purposes. *Taqui Jan* v. *Obaidulla*, *I. L. R. 21 Calc. 866*, distinguished. Neither can such an application be considered an application by *B* under s. 235 of the Code of Civil Procedure. A Court can review its own order in execution, although an appeal might have been, but was not preferred. SARAMMA v. SESHAYYA (1905). I. L. R. 28 Mad. 398

———Sch. II, Art. 179—*Application to take a step in aid of execution—Execution petition—Adjournment of sale on application of judgment-debtor consented to by decree-holder—Subsequent application within three years of date of adjournment, but more than three years from previous application—Limitation.*—A decree-holder applied for execution of his decree. The last preceding application had been made more than three years before the present one. In that application the decree-holder asked that the properties of the judgment-debtor might be sold. The judgment-debtor then applied for a postponement of the sale, to which the decree-holder consented. The present application was made within three years from the date of the judgment-debtor's application for a postponement of the sale. The sale had, in fact, not been carried out. *Held*, that the application was barred by limitation. The mere consent by a decree-holder to the application made by the judgment-debtor was not "an application" by the decree-holder, within the meaning of Art. 179 of Sch. II to the Limitation Act. *Held* also, that the acknowledgment of indebtedness in the application of the judgment-debtor for a postponement of the sale did not give a fresh starting point for limitation under s. 19 of the Act; nor could a part-payment of the principal be relied upon under

LIMITATION ACT (XV OF 1877)—*concluded.*

s. 20, as the same principle applied to ss. 19 and 20. *Kuppusami Chetty* v. *Rengasami Pillai*, *I. L. R. 27 Mad. 609*, followed. SREENIVASA CHARIAR v. PONNUSAWMY NADAR (1905). I. L. R. 28 Mad. 40

———Sch. II, Art. 179—*Mortgage—Decree for redemption—Extension of time for payment of the mortgage amount—Execution.*—In a suit for redemption of the mortgage property the decree directed that upon payment of the mortgage amount within six months from its date the decree-holder should take possession of the mortgage property. The decree was affirmed on appeal on the 6th November 1896. The decree-holder failed to pay the amount within the time fixed in the decree. The present application was made on the 15th October 1902 to the Court to have the time extended for three months. The decree-holders' last application to execute the decree was made on the 21st April, 1897. *Held*, that the application was barred by limitation. Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by Art. 179, Sch. II of the Limitation Act. *Rungiah Goundan* v. *Nanjappa Row*, *I. L. R. 26 Mad. 780*, approved ETYATI POOPARAMBIL BAVA v. MATALAKAT KRISHNA MENON (1905) . . I. L. R. 28 Mad. 211

———Sch. II, Art. 179—"*Step in aid of execution*"—*A "batta memorandum" praying for issue of sale proclamation.*—A so-called "batta memorandum" which applies for the issue of a sale proclamation and on which a sale proclamation is issued accordingly, is a "step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act, although an order for the issue of such proclamation might have been made previously. *Maluk Chand* v *Bechar Natha*, *I. L. R. 25 Bom. 659*, distinguished. *Ambica Pershad Singh* v. *Surdhari Lal*, *I. L. R. 10 Calc. 851*, followed. VIJIARAGHAVALU NAIDU v. SRINIVASALU NAIDU (1905) . . . . I. L. R. 28 Mad. 399

LIS PENDENS.

See MORTGAGE.

See SALE . . . . W. N. 225

———*Decree on mortgage against minors—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money decree—Title of the purchaser in execution of the decree on the mortgage—Stay of execution.*—*Held*, that the doctrine *of lis pendens* does not defeat a purchaser under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. *Bellamy* v.

LIS PENDENS—*concluded*

Sabine, 1 De G. and J 566; Wigram v Buckley, 3 Ch 483, referred to SHIVLAL BHAGVAN v SHAMBHUPRASAD (1905) . I. L. R. 29 Bom. 435

——— *Purchase from heir during administration suit—Rival mortgagees—Priority of title—Purchaser from Receiver in administration suit—Purchaser at sales in execution of mortgage decree—Transfer—Transfer to benamidar, pendente lite—Transfer of Property Act (IV of 1882), ss 52, 53*—When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition, which has been or may be made of the deceased's estate in due course of administration the right of the residuary legatee or heir being only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied As between the appellant and respondent, who were rival mortgagees of the property of a Muhammadan family, the Judicial Committee reversing the decision of the High Court uphell the title of the appellant, who represented a purchaser at sales by the Receiver of the High Court in a suit for administration of the estate of one of the mortgagors, as entitled to priority over that of the respondent, who claimed through a purchaser in execution of the mortgage decree at sales, which took place pending the administration suit, in one case after the order for sale by the Court and in another after the actual sale by the Receiver in that suit. The shares of all the heirs to the mortgagor's estate were, pending the suit for administration, purchased at private sales by the appellant in the name of, and were transferred to, a benamidar, who was made a party defendant in the appellant's mortgage suit and a party plaintiff in the administration suit *Held*, that the appellant being, in execution of the decree in the mortgage suit, alone represented on each side of the record, could not rely on the sales effected in such circumstances in support of his title, or derive any advantage therefrom. *Held*, also [without deciding whether such transfers could be avoided under s 52 or 53 of the Transfer of Property Act (IV of 1882) in a properly constituted suit], that the appellant must be treated as the transferee for value of the entire equity of redemption, and that the respondent, therefore, had not made out any title to redeem the appellant's mortgage, notwithstanding the subsequent sales in his mortgage suit under which he claimed. CHATTERPUT SINGH v MOHARAJ BAHADUR (1905) I. L. R. 32 Calc. 103 s.c. 9 C. W. N. 225 L. R. 32 I. A. 1

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MADRAS ABKARI ACT (MADRAS ACT I OF 1886).

——— s. 28—*Sale for arrears under—Effect on prior encumbrances—'As if they were arrears of land revenue,' meaning of—Limitation Act (XV of 1877), Sch II, Art 12*—A sale for arrears of abkari revenue of immoveable properties belonging to the defaulter under s 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale. *Ramachandra v Pichaikanni, I L R 7 Mad 434*, followed. The words 'as if they were arrears of land revenue' in the new Act have the same meaning as the words 'in like manner as for the recovery of arrears of land revenue' in the old Act, *Chinnasami Mudali v Tirumalai Pillai and the Right Honourable the Secretary of State for India, I L R 25 Mad 572*, followed. *Kadir Mohideen Moralkayar v Muthukrishna Aygar, I L R 26 Mad 230*, followed. Where lands subject to mortgage are sold under s 28 of Act I of 1886 the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within Art 12 of Sch. II of the Limitation Act, when the plaint contains no prayer for setting aside the sale IBRAHIM KHAN SAHIB v RANGASAMI NAICKEN (1905) I. L. R. 28 Mad. 420

MADRAS ACT.

——— 1882—XV.

See SMALL CAUSE COURT, PRESIDENCY TOWNS

——— 1884—IV.

See DISTRICT MUNICIPALITIES ACT

——— 1886—I.

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See DISTRICT MUNICIPALITIES ACT

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See HEREDITARY VILLAGE OFFICES ACT

——— 1899—IV.

See MADRAS COURT OF WARDS REGULATION (AMENDMENT ACT)

MADRAS COURT OF WARDS REGULATION (V OF 1804 AS AMENDED BY MADRAS ACT IV OF 1899)

——— ss 35, 37—*Power of Local Government to make rules—Such rules may provide for claims not passed into decrees—Rules 6 and 7 do not authorise a reference to the District Court, when no dispute as to fact or extent of liability in regard to principal matter of claim—Civil Procedure Code (Act XIV of 1882), s 522 (a), (b) and (d)*—Under ss. 35 and 37 of Regulation V of 1804, the Local Government has power to make rules in regard to claims which have not merged into decrees and to extend to such claims the procedure laid

MADRAS COURT OF WARDS REGULATION (V OF 1804 AS AMENDED BY MADRAS ACT IV OF 1899)—*concluded.*

down in s. 322 (*a*), (*b*) and (*d*) of the Code of Civil Procedure. Rules 6 and 7 of the rules framed under s. 35 of Regulation V of 1804 do not authorise the Decree Collector to make a reference to the District Court in respect of the interest to be allowed to a creditor, unless there is a dispute as to the fact or extent of liability in regard to the principal matter of the claim, and the question of interest arises as accessory and incidental to the disposal of the main claim. THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES *v.* RAMASAMI CHETTI (1905) . . I. L. R. 28 Mad. 489

MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884).

———— s. 191, cl. 2, and s. 262, cl. 2—*Construction of statutes, observations on—Refund of money obtained under a void agreement—Contract Act (IX of 1872), ss. 23, 65—An agreement tending to create a monopoly void as opposed to public policy.*—Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under s. 23 of the Indian Contract Act. The power conferred by s. 191, cl. 2 of Madras Act IV of 1884 on the Chairman of a municipality to license places for selling meat, etc., only empowers him to consider the propriety of granting or withholding licenses in each case and not to enter into agreements, which must preclude him from considering any such application, except from a particular person or persons. A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant, unless it must be implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. *Rossi v. Edinburgh Corporation, (1905) A. C. 21,* referred to. *Logan v. Pyne, 43 Iowa 524 : 22 Am. Rep. 261, 262,* followed. Doubts as to the existence of such powers must be resolved against the Corporation and in favour of the public. Where a municipal body receives license fees under a void agreement, it must, when the agreement is set aside, refund the amount so received under s. 65 of the Contract Act; and a suit to recover such amount will not be barred by s. 262 (2) of Madras Act IV of 1884. Discretionary power to grant licenses conferred by s. 191, cl. 2, District Municipalities Act, does not empower Municipalities to refuse licenses, unless clear grounds exist for so refusing. SOMU PILLAI *v.* THE MUNICIPAL COUNCIL, MAYAVARAM (1905) . . I. L. R. 28 Mad. 520

MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT III OF 1889).

———— s. 4—*Allowing offensive matter to flow into a "street"—Discharge into drains not forming part of street—Definition of street.*—A defendant was charged under s. 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed: *Held* that a "street" is any way or road in a city having houses on both sides; and that in consequence this definition excluded the drain or ditch on either side of the roadway; that the drain was not part of the "street," and that the offence charged had not been committed. VENKATRAMA CHETTI *v.* EMPEROR (1905) . . . . I. L. R. 28 Mad. 17

MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT III OF 1889)—*concluded.*

MADRAS HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895).

———— s. 5—*Emoluments of village office —Non-liability to attachment of soil by Courts.*—The prohibition in s. 5 of the Madras Hereditary Village Offices Act (III of 1895) against attachment and sale by the Courts is absolute and deprives Civil Courts of all jurisdiction to give directions for sale of inam lands granted as emoluments for the performance of duties connected with the offices referred to in that section. A decree directing the sale of such lands is *ultra vires.* RAJA OF VIZIANAGRAM *v.* DANTIVADA CHELLIAH (1905).
I. L. R. 27 Mad. 84

MADRAS SALT ACT (MADRAS ACT IV OF 1889).

———— ss. 16, 25, 87—*Limitation—Suit to recover saltpans, when license improperly cancelled.*—Under ss. 16 and 25 of the Madras Salt Act, the Government is empowered on cancelling a license to take possession of the proprietary rights of others in the saltpans. Where Government have so taken possession of saltpans, a suit to recover the same brought against the Government and its assignees will be a suit in respect of acts done under the Act and will fall within s. 87 of the Act, even when the license has been improperly cancelled and will be barred, if not brought within the period prescribed by that section. KURNAM BUTCHAYYA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1905).
I. L. R. 28 Mad. 551

MAGISTRATE.

See CALCUTTA MUNICIPAL ACT.
9 C. W. N. 18

See CRIMINAL PROCEDURE CODE.

See JURISDICTION.
I. L. R. 32 Calc. 552

See WITNESSES I. L. R. 32 Calc. 1093

LIS PENDENS—*concluded*

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MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT III OF 1889)—*concluded.*

MADRAS HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895).

——— s. 5—*Emoluments of village office—Non-liability to attachment of soil by Courts.*—The prohibition in s. 5 of the Madras Hereditary Village Offices Act (III of 1895) against attachment and sale by the Courts is absolute and deprives Civil Courts of all jurisdiction to give directions for sale of inam lands granted as emoluments for the performance of duties connected with the offices referred to in that section. A decree directing the sale of such lands is *ultra vires.* RAJA OF VIZIANAGRAM *v.* DANTIVADA CHELLIAH (1905). I. L. R. 27 Mad. 84

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——— ss. 16, 25, 87—*Limitation—Suit to recover saltpans, when license improperly cancelled.*—Under ss. 16 and 25 of the Madras Salt Act, the Government is empowered on cancelling a license to take possession of the proprietary rights of others in the saltpans. Where Government have so taken possession of saltpans, a suit to recover the same brought against the Government and its assignees will be a suit in respect of acts done under the Act and will fall within s. 87 of the Act, even when the license has been improperly cancelled and will be barred, if not brought within the period prescribed by that section. KUNNAM BUTCHAYYA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1905). I. L. R. 28 Mad. 551

MAGISTRATE.

See CALCUTTA MUNICIPAL ACT. 9 C. W. N. 18

See CRIMINAL PROCEDURE CODE.

See JURISDICTION. I. L. R. 32 Calc. 552

See WITNESSES I. L. R. 32 Calc. 1093

MAHOMEDAN LAW.

1 Acknowledgment
2 Gift
3 Pre emption
4 Share
5 Trust
6 Waqf
7 Will.

See Gift

See Kidnapping from Lawful Guardianship I. L. R. 32 Calc 444

See Pre emption I. L. R. 27 All. 160

MAHOMEDAN LAW—ACKNOWLEDGMENT

——— *Acknowledgment—Legitimacy—Name of a person whether indicates the person to be Mahomedan or Hindu*—Unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of legitimation according to Mahomedan law, where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty *Liaqat Ali v Karimunnessa I L R 15 All 396; Atkunnissa v Karimunnessa, I L R 23 Calc 130* and *Dian Bibi v Lalon Bibi, I L R 27 Calc 801, distinguished* The doctrine of acknowledgment is an integral portion of the Mahomedan family law and the conditions under which it will take effect, must be determined with reference to Mahomedan jurisprudence rather than to the Evidence Act. *Mahomed Allahdad Khan v Mahomed Ismail Khan, I L R 10 All 239 Mahatab v Prince Ahmed, 10 C L R 293*, referred to. *Abdul Razack v Aga Mahomed, L R 21 I A 56; s c I L R 21 Calc 666*, distinguished. Fazil-atunnessa v Kamarunnessa (1905) 9 C. W N 325

MAHOMEDAN LAW—GIFT

——— *Gift Possession, transfer of by the donor—Relinquishment of a share by a Mahomedan in the property of the deceased—Valuable consideration—Transfer of Property Act (IV of 1882), s 53—Fraudulent transfer—Good faith*—To facilitate the action of the Collector in obtaining the certificate of guardianship to the property of a Mahomedan minor, under the Guardian and Wards Act (VIII of 1890), *M*, the uncle of the minor relinquished in favour of the minor, the share to which he was entitled in the property of his deceased brother, the father of the minor girl. The certificate was duly obtained by the Collector. The plaintiff, a judgment creditor of *M*, then sued the minor for a declaration that *M*'s share in the property of his brother, which he had relinquished, was liable to attachment and sale in execution of his decree The lower Court decreed the plaintiff's claim on the grounds that the relinquishment was not valid and binding upon the donor under the Mahomedan Law since being a gift it had not been accompanied and perfected by possession and that it was void against *M*'s creditors under s. 53 of the Transfer of Property Act (IV of 1882), because it had been made with intent to defeat, delay or defraud them. *Held*, that the relinquishment by *M* of his share in the property of his brother was not a gratuitous transaction, but was supported by valuable consideration, since as consideration for the Collector's undertaking the responsibility of administrator of the minor's property, he agreed to relinquish his share to the minor: the relinquishment was not a mere gift, but was supported by consideration which the law regards as valuable and that, therefore, the rule of Mahomedan law, which requires that a gift must be accompanied by possession to render it valid and binding upon the donor, did not apply to the transaction *Held* further, that as the transfer was made by *M* honestly with the intention of parting with his share in favour of the minor for the purpose of removing the difficulties in the way of the Collector's application then pending and of enabling him to obtain a certificate of guardianship to the minor, and as it was not a contrivance resorted to for his own personal benefit, it was not void under s 53 of the Transfer of Property Act (IV of 1882) Mahammadunnissa Begum v J C. Bachelor (1905) I L. R 29 Bom. 428

——— *Gift—Transfer of possession—Costs*—On the 5th day of July, 1901, *J*, a Mahomedan lady, executed a gift of moveable and immoveable properties, including the house in which she resided, in favour of *A, B, C, D E* the widow and minor children, respectively, of her deceased son *M*. After the execution of the deed of gift, *A* took exclusive possession of the house on her own and on her children's behalf On the 7th day of July, 1901, *J* returned to the house and at her instance, the tenants who resided on a portion of the property transferred, attorned to *A*. During the absence of *J* from July 5th to July 7th, 1901, certain furniture and other moveable property, belonging to her, remained in the house the subject of the gift. On the 19th of October, 1903 *J* died intestate. Upon *S*, the sole surviving daughter of *J*, filing a suit claiming that the alleged gift was invalid under Mahomedan law: *Held* the execution of a deed of gift of immoveable property accompanied by a temporary abandonment of possession by the donor in favour of the transferee and the attornment of tenants to the transferee is a sufficient delivery of seisin to make the gift valid under the Mahomedan law The fact that during the abandonment of possession, a portion of the donor's moveable property remains on the premises and that the donor, after a temporary absence, continues to reside in the same does not render the transfer of possession inoperative *Shaikh Ibhram v Shaikh Sulaman, I L R 9 Bom 146*, followed It was within the discretion of the lower Court to allow separate costs to the 1st defendant and her minor children But only one set of costs was allowed in the appeal Khaver Sultan v Rukhia Sultan (1905) I L. R. 29 Bom. 488

MAHOMEDAN LAW—PRE-EMPTION

——— *Pre-emption, right of—Non Mahomedans—Customs among Hindus of Behar—Pre emptor a stranger in the district—Sale*—Where the

MAHOMEDAN LAW—PRE-EMPTION —*concluded.*

custom of pre-emption is judicially noticed as prevailing in a certain local area, it does not govern persons, who though holding lands therein for the time being, are neither natives of, nor domiciled in, the district. Where therefore the pre-emptor was a Hindu co-sharer, neither a native of, nor domiciled in, Chapra, where the property was situate, but an inhabitant of the district of Balia in the United Provinces: *Held* that, although there may be a custom of pre-emption among the Hindus of Behar, he had no right of pre-emption. *Held, further*, that no right of pre-emption arises when the sale, upon the contingency of which the right is claimed, is a fictitious transaction arranged so as to cheat the pre-emptor. PARSASHTH NATH TEWARI v. DHANAI OJHA (1905). I. L. R. 32 Calc. 988

———— *Pre-emption—Shiah vendor—Hindu purchaser—Right of Sunni co-sharer to pre-empt in the case of a Shiah vendor and Hindu purchasers—Sunni law—Talab-i-ishtish-had—Names of all the purchasers not specified at the time.*—The law applicable to a suit for pre-emption by a Sunni co-sharer against a Shiah vendor and Hindu purchasers is the Sunni law. *Poorno Singh* v. *Hurrycharan Surmah, 10 B. L. R. 117; Dwarka Dass* v. *Husain Bakhsh, I. L. R. 1 All. 564; Abbas Ali* v. *Maya Ram, I. L. R. 12 All. 229; Quarban Husain* v. *Chote, I. L. R. 22 All. 102*, referred to. No particular formula is necessary for the assertion of the pre-emptor's claim on the occasion of the performance of the preliminary formalities, so long as the claim is unequivocally made. Where, therefore, the vakil of the pre-emptor proclaimed in the presence of two of the purchasers and at the empty doors of the other three that "*J. S.* and others have purchased," without specifying the names of the others: *Held*, that there was nothing equivocal in the formulation of the claim and that the *talab-i-ishtish-had* was duly performed in this respect. JOG DEB SINGH v. MAHOMED AFZAL (1905) . . . I. L. R. 32 Calc. 982 s.c. 9 C. W. N. 826

———— *Mahomedan law—Talab-i-ishtish-had—Reference to the previous talab-i-mawasibat necessary.*— When in asserting a claim for pre-emption under the Mahomedan law the making of the *talab-i-ishtish-had* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Abid Husain* v. *Bashir Ahmad, I. L. R. 20 All. 499*, and *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra, I. L. R. 17 Calc. 545*, followed. *Chotu* v. *Husain Bakhsh, Weekly Notes, 1893, p. 101*, referred to. *Sahibzadi* v. *Alahdiya, Weekly Notes, 1902, p. 147*, and *Nundo Persad Thakur* v. *Gopal Thakur, I. L. R. 10 Calc 1009*, dissented from. MUBARAK HUSAIN v. KANIZ BANO (1905) . I. L. R. 27 All. 160

MAHOMENAN LAW—SHARE.

———— *Mahomedan law—Claim to share in grandfather's estate—Onus probandi—Evidence Act, s 108.*—Where the plaintiff claimed under Mahomedan law a share in his grandfather's estate, the onus is on him to show, either by establishing a presumption under Evidence Act, 1872, s. 108, or by actual evidence that his father's death occurred at a date subsequent to that of the deceased owner; otherwise he is excluded by the children of the deceased living at his death as being earlier in degree. MOOLLA CASSIM BIN MOOLLA AHMED v. MOOLLA ABDUL RAHIM . . . . L. R. 32 I. A. 177

MAHOMEDAN LAW—TRUST.

———— *Trust—Will—Reference to trust deed in will for the purpose of confirming it—Testamentary document—Trustee de son tort—Express trustee—Liability to account—Limitation Act (XV of 1877), s. 10.*—Under the Mahomedan law possession is as necessary in the case of trusts as in the case of gifts—not necessarily direct possession of the premises, but the best possession of which the property is capable at the time, either actual, symbolical or constructive. Where a trust deed is referred to in a will with a view of confirming it, it is confirmed and becomes part of the will. If express trusts are created by deed or will and some third party takes upon himself the administration of the trust property he becomes a trustee *de son tort* and, as such, is bound to account as if he were the rightful trustee and limitation will not run in his favour under s. 10 of the Limitation Act (XV of 1877). MOOSABHAI v. YACOOBBHAI (1905). I. L. R. 29 Bom. 267

MAHOMEDAN LAW—WAQF.

———— *Waqf—Mutwalli—Appointment of successor by dying mutwalli—Stranger, if may be appointed.*—There is no prohibition against a dying *mutwalli* appointing as his successor in office a stranger, *i.e.*, one who is not a member of the family of the deceased founder of the *waqf*. AMIR ALI v. WAZIR HYDER (1905) . . 9 C. W. N. 876

———— *Endowment—Waqf—Validity—Religious and charitable clauses ancillary to aggrandisement of family—Limitation—Adverse possession—Estate inherited from mother—Exclusive enjoyment by father as trustee.*—The terms of a *waqfnama* executed by a Mahomedan and his wife were almost all expressly directed to securing the husband in the full enjoyment of the whole estate as long as he lived, to keeping that estate in perpetuity entire and inalienable under efficient management by a single person, to maintaining the dignity of the family, and to making provision for its members. The bulk of the property was not affected by any religious or charitable trusts. The religious and charitable clauses dealt with matters naturally incident to maintaining the dignity of the family, their secondary character appearing *inter alia* from the fact that while the deed purported to create the *waqf* as from its date, the religious and charitable trusts were not to become obligatory, until after the death of both the executants. *Held*, that no valid

MAHOMEDAN LAW—WAQF—*concluded*

waqf was created by the deed. The wife died shortly after the execution of the deed and the husband about 14 years later. *Held*, that the High Court was right in holding that exclusive enjoyment by the husband of the wife's estate in terms of the deed, did not constitute his possession adverse to a daughter, who survived the wife, but predeceased the husband and the right of the heirs of the daughter to recover her share of her mother's estate was not lost. MIR ANWAR v RAZIA BIBI (1905).

9 C. W. N. 625
s.c I. L. R. 27 All. 620
L. R. 32 I. A. 86

MAHOMEDAN LAW—WILL

——— *Will—Heirs.*—The power of disposition by will of a Mahomedan testator being limited to a third of his estate, the remaining two thirds pass to his heirs, whatever the terms of the will may be The consequence of a grant of probate of a Mahomedan will, therefore, is that the executor, when he has realised the estate, is a bare trustee for the heirs as to two thirds and an active trustee as to one-third for the purposes of the will. As the heirs claim adversely to the will, the grant of the probate does not create any estoppel, so as to prevent them from putting forward their claim as against a beneficiary under the will MIRZA HURATULAIN v. NUZATUD DOWLA ABBAS HOSSEIN KHA *alias* PEARA SAHEB (1905) 9 C W. N 938
s c. L. R. 32 I. A 244

MAINTENANCE

See HINDU LAW

I. L. R. 32 Calc. 234
9 C. W. N. 271, 651

See KHOJA MAHOMEDANS

I. L. R. 29 Bom. 85

——— *Suit for maintenance—Illegitimate child—Right of suit—Order of Criminal Court refusing maintenance, effect of—Criminal Procedure Code (Act V of 1898), s 488—Civil Procedure Code (Act XIV of 1882), s 11—Hindu Law*—Under the Hindu law as well as upon general principles, the father of an illegitimate child is bound to provide for its maintenance A suit lies in the Civil Court for maintenance of an illegitimate child notwithstanding an order of the Magistrate, under s 488 of the Criminal Procedure Code, refusing to grant maintenance *Subad Domni* v *Kasiram Dome*, 20 W R 68, and *Subhadra* v *Baideo Dube*, I L R 19 All 29, distinguished. GHANA KANTA MOHANTI v GERELL (1905)

I. L. R. 32 Calc. 479

——— *Grant for maintenance—Babuana property, nature of—Power of grantee to alienate—Kulachar of Darbhanga Raj—Babuana* property granted in accordance with the Kulachar or family custom of the Darbhanga Raj is property granted to the junior male members of the family to be enjoyed by them in lieu of money maintenance subject to the property rights of the grantor and his ultimate claim as reversioner on the extinction

MAINTENANCE—*concluded*

of the grantee's dependants in the male line. The grantor remains responsible for the payment of the Government revenue and retains his position as the recorded proprietor of the property assigned The grantee is bound to pay to the grantor such revenue which the latter pays into the Collectorate, and the obligation can be enforced by suit The grantee has a right to alienate the property subject only to the contingent interest of the grantor. RAMESWAR SINGH v JIBENDER SINGH (1905)

I. L. R. 32 Calc. 683
s c 9 C W. N. 567

——— *Maintenance—Effect of Civil Court decree in a suit for restitution of conjugal rights upon an order for maintenance passed by a Magistrate*—A husband, against whom an order had been passed by a Magistrate under s 488 of the Code of Civil Procedure directing him to pay a monthly allowance of Rs 8 for the maintenance of his wife, brought a suit against his wife for restitution of conjugal rights The suit was compromised, and a consent decree passed whereby the petitioner was to pay the respondent Rs 4 per mensem and to provide a house for her to live in near his own. *Held*, that this decree of the Civil Court superseded the order of the Magistrate passed under s. 488 of the Code of Civil Procedure *In re Balakidas*, I L R. 23 Bom 494, followed NUR MOHAMMAD v AYESHA BIBI (1905) . I. L. R. 27 All. 483

———*Maintenance of child—Power to cancel an order for maintenance—Held*, that where an order has once been passed by a competent Court under s. 488 for the payment of maintenance for a child, the only power that exists of modifying such an order is that given by s 489 of the Code. BUDHNI v DABAL (1905) I. L. R. 27 All. 11

MALABAR LAW

——— *Karnavan—Renunciation of right to succeed as karnavan—Validity*—It is open to a karnavan of a tarwad to renounce his right to manage the tarwad affairs. *Cherukomen* v. *Ismala*, 6 *Mad H C 145*, commented on KEVATH PUTHEN VITTIL TAYAZHI v NARAYANAN (1905)

I. L. R. 28 Mad. 162

MALIANS

See EVIDENCE ACT.

See GRANT

MALICE

See DEFAMATION

I. L. R. 32 Calc. 756

See LIBEL . I. L. R. 32 Calc. 318

MALICIOUS PROSECUTION.

See CAUSE OF ACTION

I. L. R. 29 Bom. 388

——— *Malicious prosecution or illegal arrest—Interposition of judicial act between*

MALICIOUS PROSECUTION—*concluded.*

charge and imprisonment.—When any illegal arrest takes place in the course of criminal proceedings instituted by a complainant he is not liable for the mistakes of the Court or any of its officers. His responsibility, as far as the illegal arrest is concerned, ceases as soon as he puts the law in motion. When the opinion and judgment of a judicial officer comes between the charge and imprisonment of the person charged, the complainant cannot be held liable for false imprisonment. *Austin* v. *Dowling, L. R. 10 C. P. 534*, followed. *Bates* v. *Pilling, 6 B and C. 38; Secretary of State for India* v. *Jagat Mohini Dassi, I. L. R. 28 Calc. 540; Lock* v. *Ashton, 12 Q. B. 871*, referred to. *Painter* v. *Liverpool Gas Company, 3 Ad. and E. 433*, explained and distinguished. *B* on behalf of the Chairman of the Cossipore Municipality, the defendant, applied for a summons against the plaintiff for having acted in contravention of Bengal Act III of 1884. The Magistrate, who was also paid Secretary of the Municipality, issued the summons, which, however, was never served. An endorsement, however, was made by the serving officer that service had been effected. On the returnable date *B* appeared to prosecute, but the plaintiff did not appear and the Magistrate ordered the issue of a warrant for the plaintiff's arrest. A warrant was issued and renewed from time to time. Subsequently the plaintiff was arrested on a renewed warrant, which was signed by two Magistrates, one of whom was the Vice-Chairman of the Municipality and the other an honorary member. Plaintiff accordingly sued the defendant for damages alleging that he had maliciously and fraudulently withheld the service of summons, that the summons was wrongly served and that the defendant left him in ignorance of any service at all and that the defendant maliciously and falsely procured the issue of a warrant and maliciously, without reasonable and probable cause, procured his illegal arrest: *Held*, that no action lay for illegal arrest. The service of summons is the act of the Court and the familiar procedure of identification is altogether outside the law, and is in no way legally necessary. An action for malicious prosecution cannot lie, if at some time after the institution of the case, *i.e.*, the application for summons, the defendant acted without reasonable cause and with malice; the whole of the legal proceedings must come to a termination before such an action can be maintained. It will not lie on part only of the criminal proceedings. MONMOTHO NATH DUTT *v.* THE CHAIRMAN OF THE COMMISSIONERS OF THE COSSIPORE-CHITPORE MUNICIPALITY (1905).

9 C. W. N. 736

MANAGER.

See FACTORIES ACT.

I. L. R. 29 Bom. 423

See MAGISTRATE.

I. L. R. 32 Calc. 287

MANDATORY INJUNCTION.

See CIVIL PROCEDURE CODE.

——— *Specific relief—Mandatory injunction—Description of Court—Injunction refused upon unsubstantial grounds.*—In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer the Court found that the building had been erected as alleged by the plaintiffs, but refused to grant them a mandatory injunction upon the ground that "the area was reclaimed by the appellant, defendant, and that others (the plaintiffs included), who have done the same, have been allowed to build on the areas thus reclaimed without any objection, and that no special damage was done." *Held*, that this was not a valid reason for refusing to grant a mandatory injunction; and that such refusal was under the circumstances a good ground of appeal within the meaning of s. 584 of the Code of Civil Procedure. RAM BAHADUR PAL *v.* RAM SHANKAR PRASAD PAL (1905).

I. L. R. 27 All. 688

MARINE INSURANCE.

——— *Policy of insurance—Memorandum in a policy—Written conditions—Printed conditions—Particular average loss—Stranding of the ship.*—The plaintiffs shipped certain goods from Cochin and Calicut for carriage to Karachi by a craft. The goods were covered by three policies of marine insurance. The three policies were in almost identical terms with this difference that the following words, which occurred in the body of the policy, were printed on one of them and written on the other two: "Warranted free from the particular average, unless the vessel be sunk or burnt." The memorandum at the foot, after enumerating certain articles, proceeded: "All other goods free from average under three per cent., unless general or occasioned by the ship's being stranded." And then there was added a note in Gujarati, which as translated ran: "Dhanji Madat Rahman Nakhwa Osman from the seaport town of Cochin and the seaport town of Calicut up to arrival at the seaport town of Karachi (insurance) on the goods to be without damage—loss on account of damage is to be borne by the owner of the goods." The craft, in which the goods were, was stranded and did not sink, but the goods damaged were over three per cent. The plaintiffs thereupon sued the underwriters on the three policies in respect of damage to goods. *Held*, that on the true construction of the policies, the defendants were not liable for the particular average loss occasioned by the ship's being stranded. *Held* also, that the office of a memorandum in a policy ordinarily is to limit, not to impose, liability, so that it would be contrary to one's expectation that it should have the operation of creating a liability, where none apart from it existed. *Held*, further, that even if the memorandum could be regarded as capable of imposing a liability that would not otherwise exist, still applying the doctrine of *Robertson* v. *French, 4 East 135; Dudgeon* v. *Pembroke, 2 App. Cas. 284; Glynn* v. *Margetson & Co., A. C. 351; Gumm* v. *Tyrie, 33 L. J. Q. B. 97;* and *Beier* v. *Chhotalal, 6 Bom. L. R. 948;* the memorandum did not create a liability, which was expressly exempted in the body of the policy, and thus was never undertaken. HAJI HASUM *v.* CHUNILAL (1905) . . . I. L. R. 29 Bom. 360

MARKET VALUE.

See COMPENSATION

MARRIAGE.

See HINDU LAW.

——— *Validity of marriage—Roman Catholic of Indian domicile—Marriage with deceased wife's sister—Nullity of marriage—Domicile*—The Courts in India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations from marrying his deceased wife's sister who by the law of her own Church, may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law *Lopes* v *Lopez, I L R 12 Calc 706*, referred to. *Per* MITRA, *J*—In India there is no enactment forbidding absolutely the marriage of a domiciled British Indian subject with his deceased wife's sister In such a case the rule to be applied is that of equity, justice and good conscience and for which the usages of the class to which the parties belong, may be looked to. *Brook* v *Brook, 9 H L C 193; In re Bozzelli's settlement, Hussey Hunt* v *Bozzelli, 1 Ch 751.* H A LUCAS v THEODORAS LUCAS (1905) . . I. L. R. 32 Calc. 187 s.c. 9 C W.N 567

MERCHANDISE MARKS ACT (IV OF 1889)

See TRADE MARK. I L. R. 32 Calc 969

MERGER.

See BENGAL TENANCY ACT, s 22 9 C W N 249

MESNE PROFITS.

See CIVIL PROCEDURE CODE

——— *Limitation—Limitation Act (XV of 1877), s 14 Sch II, Art 109—"Cause of a like nature"—Res judicata—Past and future mesne profits previous suit for—Civil Procedure Code (Act XIV of 1882), s 13 Expl III*—For the purpose of limitation, mesne profits must be regarded as accruing due from day to day, unless shown to fall due otherwise so that all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred *Thakore Dass Ray Chowdhry* v *Nabin Krista Ghose, 22 W R 126*, distinguished. *Abas* v *Fazil-ud-din, I L R 24 Calc 413*, referred to. S 14 of the Limitation Act does not entitle a plaintiff in a subsequent suit for mesne profits to a deduction of the period during which his previous suit was pending when the Court in the previous suit did not pass a decree for mesne profits subsequent to the institution of the suit, either through inadvertence or because the claim was not specially pressed. *Deo Prosad Sing* v *Partab Kuree, I L R 10 Calc 86; Hem Chandra Chowdhry* v *Kali Prosanna Bhadury, I L R 30 Calc. 1033; Sheth Kahandas Narandas* v *Dahia Bhai, I L R 3 Bom 182*; and *Futali Meheti* v

MESNE PROFITS—*concluded*

Tulja, I L R 3 Bom. 223, distinguished. S. 13 of the Civil Procedure Code does not bar a suit for mesne profits, which was claimed in a previous suit between the parties, but in regard to which the decree was silent the mesne profits claimed in the second suit being for a period subsequent to the institution of the first suit. *Mon Mohon Sirkar* v *The Secretary of State for India, I L R 17 Calc 968; Ram Dogal* v *Madan Mohan Lal, I L R. 21 All 425, Bhirrao* v *Sitaram, I L R 19 Bom 532*, and *Ramabhadra* v *Jagannatha, I L R 14 Mad 328*, followed. G S HAYS v PADMANAND SINGH (1905) I. L. R. 32 Calc 118

MINERALS

See GRANT

MINOR.

See CHEATING . I. L R 32 Calc 775

MINORITY.

See LIMITATION ACT, s 7 9 C W.N 537

MIRASI TENANT

See INAMDAR.

MISDIRECTION.

See PENAL CODE, ss 114, 199, 466. 9 C W. N. 69

MISJOINDER.

See CIVIL PROCEDURE CODE

See CRIMINAL PROCEDURE CODE s 133 9 C W. N. 73

MITAKSHARA

——— Ch. I, ss 6, 7, Ch. II, s. 9, Ch. VI, s 4.

See HINDU LAW I. L. R 32 Calc. 158, 234

MORTGAGE. Col.

1. CONSTRUCTION OF MORTGAGE . . 261
2. POSSESSION UNDER MORTGAGE . . 266
3. REDEMPTION 266

See BANKER AND CUSTOMER 9 C W. N. 745

See CIVIL PROCEDURE CODE, ss 263, 372. 9 C. W. N. 171, 693

See CONTRIBUTION SUIT FOR I. L. R. 32 Calc 643

See DOCUMENT.

See EXECUTION OF DECREE I. L. R. 32 Calc. 494

See LEASE . I. L. R. 29 Bom. 391

See LIMITATION ACT, ss 19 20, 21 9 C. W. N. 868

MORTGAGE—*continued.*

See REGISTRATION ACT.
I. L. R. 32 Calc. 46

See SALE.

See STAMP ACT . I. L. R. 29 Bom. 263

See TRANSFER OF PROPERTY ACT, s. 59.
9 C. W. N. 697

See TRANSFER OF PROPERTY ACT, s. 73.
9 C. W. N. 117

See TRANSFER OF PROPERTY ACT, s. 86
9 C. W. N. 577

1. CONSTRUCTION OF MORTGAGE.

——— *Attestation, absence of—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100.*—Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act: *Held*, that it did not operate as a charge under s. 100 of the Act. *Rani Kumari Bibi* v. *Sri Nath Roy*, *I. C. W. N. 81*, and the observations of BANERJEE, *J.*, in *Tofaluddi Peada* v. *Mahar Ali Shaha*, *I. L. R. 26 Calc. 78*, approved. PRAN NATH SARKAR *v.* JADU NATH SAHA (1905).
I. L. R. 32 Calc. 729
s.c. 9 C. W. N. 247

——— *Equitable set-off—Redemption—Usufructuary mortgage—Accounts, mode of taking—Surplus receipts—Civil Procedure Code (Act XIV of 1882), s. 111.*—The law of equitable set-off applies where the cross claims, though not arising out of the same transaction, are closely connected together. Where, after making the payments stipulated in a deed of usufructuary mortgage, a surplus began to accumulate in the hands of the mortgagee, he would be entitled to set off against such accumulations a claim for rents subsequently accruing due to him from the mortgagor in respect of a holding owned by the latter and included in the mortgaged property, notwithstanding that such rent might be barred by limitation. *Nursingh Narain Singh* v. *Lukputty Singh*, *I. L. R. 5 Calc. 333*, referred to. SHEO SARAN SINGH *v.* MOHABIR PERSAD SHAH (1905).
I. L. R. 32 Calc. 576

———*Registered sub-mortgage—Notice—Absence of knowledge of the sub-mortgage by the mortgagor—Payment made in good faith by mortgagor to mortgagee.*—When a mortgagor makes a payment to the mortgagee in good faith without knowledge of a registered sub-mortgage, the payment is not vitiated on the ground that it was made subsequent to the registration of the sub-mortgage. Registration is notice for some purposes, but it cannot be treated as notice for the purpose of vitiating such payment. *Williams* v. *Sorrell*, *4 Vesey 389*, referred to. SAHADEV *v.* SHEKH PAPA MIYA (1905).
I. L. R. 29 Bom. 199

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

——— *Arrangement between mortgagee and some of several mortgagors, effect of.*—The rule that an arrangement between one or more of several mortgagors and the mortgagee, whereby the former are released from their liability under the mortgage in consequence of payment of a portion of the debt or otherwise, does not affect mortgagors not parties to the arrangement, if their rights against the co-mortgagors are likely to be prejudiced thereby, has no application, where the mortgagor, who is not a party, is sought to be made liable only for his just share of the debt. Where a division of joint family property is effected by consent or by a decree of Court, an arrangement by some of the members with a mortgagee of the joint family property, by which their shares were to be released on payment of their share of the debt, is binding on members, who are not parties to the arrangement, so long as they are not called upon to pay more than their share of the debt as settled by the partition. VENKATACHELLA CHETTY *v.* SRINIVASA VARADA CHARIAR (1905).
I. L. R. 28 Mad. 555

——— *Mortgage of interest in tenancy in common by one of two co-tenants—Deterioration of mortgagor's interest by act of other co-tenant—Suit for damages by mortgagee against wrong-doer—Maintainability—Limitation Act (XV of 1877), Art. 49—Wrongfully removing specific property.*—*K*, who was a tenant in common with the defendant, mortgaged her interest to the plaintiff. The plaintiff instituted a suit against *K* for the recovery of the mortgage amount by sale of the mortgaged property. Pending the appeal in that suit, the defendant cut down all the trees on the land, and appropriated the same to himself. On the sale of *K's* interest in the land, which took place after the removal of the trees, the plaintiff realised only a portion of the decretal amount. The mortgagee now instituted the present suit against the defendant for the damage suffered by him by reason of the defendant having appropriated *K's* share of the wood. The suit was filed within three years of the act complained of. *Held*, that the suit was maintainable. From the time of lending his money, the mortgagee, whether in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior. *Held, also*, that the suit was not barred by limitation. It was not the act of cutting down the timber, but the subsequent appropriation of the wood by the defendant, which ought to have been left for the share of the mortgagor, that operated to the injury of the plaintiff. Limitation began to run from the date when the defendant appropriated the wood to himself. AIYAPPA REDDI *v.* KUPPUSAMI REDDI (1905) . . . . I. L. R. 28 Mad. 208

——— *Prior and subsequent incumbrances—Rights of puisne mortgagee paying off a prior mortgage.*—On the 2nd of June 1863 Bikram mortgaged certain property by way of simple mortgag

MARKET VALUE.

See COMPENSATION

MARRIAGE.

See HINDU LAW.

——*Validity of marriage—Roman Catholic of Indian domicile—Marriage with deceased wife's sister—Nullity of marriage—Domicile*—The Courts in India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations, from marrying his deceased wife's sister who, by the law of her own Church, may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law *Lopes* v *Lopez, I L R 12 Calc 706*, referred to. *Per* MITRA, *J*—In India there is no enactment forbidding absolutely the marriage of a domiciled British Indian subject with his deceased wife's sister In such a case the rule to be applied is that of equity, justice and good conscience, and for which the usages of the class, to which the parties belong, may be looked to. *Brook* v *Brook, 9 H L C 193; In re Bozzelli's settlement, Hurey Hunt* v *Bozzelli, 1 Ch 751* H A. LUCAS v THEODORAS LUCAS (1905) . . I. L. R. 32 Calc 187 s.c 9 C. W. N 567

MERCHANDISE MARKS ACT (IV OF 1889).

See TRADE MARK. I. L. R. 32 Calc 969

MERGER.

See BENGAL TENANCY ACT, s 22. 9 C. W N 249

MESNE PROFITS

See CIVIL PROCEDURE CODE

——*Limitation—Limitation Act (XV of 1877), s 14 Sch II, Art 109—"Cause of a like nature"—Res judicata—Past and future mesne profits, previous suit for—Civil Procedure Code (Act XIV of 1882), s 13, Expl III*—For the purpose of limitation, mesne profits must be regarded as accruing due from day to day, unless shown to fall due otherwise so that all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred *Thakore Dass Ray Chowdhry* v *Nabin Krista Ghose, 22 W R 126*, distinguished. *Abas* v *Fassih ud-din, I L R 24 Calc 413*, referred to. S 14 of the Limitation Act does not entitle a plaintiff in a subsequent suit for mesne profits to a deduction of the period during which his previous suit was pending when the Court in the previous suit did not pass a decree for mesne profits subsequent to the institution of the suit, either through inadvertence or because the claim was not specially pressed. *Deo Prosad Sing* v. *Partab Kooree, I L R 10 Calc 86; Hem Chandra Chowdhry* v *Kali Prosanna Bhadury, I L R 30 Calc. 1033; Sheth Kahandas Narandas* v *Dahyabhai, I L. R. 3 Bom. 182*; and *Futali Meheti* v. *Tulja, I L R 8 Bom. 223*, distinguished. S 13 of the Civil Procedure Code does not bar a suit for mesne profits, which was claimed in a previous suit between the parties, but in regard to which the decree was silent, the mesne profits claimed in the second suit being for a period subsequent to the institution of the first suit. *Mon Mohon Sirkar* v *The Secretary of State for India, I L. R 17 Calc 969; Ram Doyal* v *Madan Mohan Lal, I L. R. 21 All 425, Bhirrav* v *Sitaram, I L R. 19 Bom 532*, and *Ramabhadra* v *Jagannatha, I L R 14 Mad 329*, followed. G S. HAYS v PADMANAND SINGH (1905). I. L. R. 32 Calc. 118

MINERALS.

See GRANT

MINOR.

See CHEATING . I. L. R. 32 Calc. 775

MINORITY.

See LIMITATION ACT, s 7. 9 C W. N. 537

MIRASI TENANT.

See INAMDAR.

MISDIRECTION.

See PENAL CODE, ss 114, 199, 466. 9 C. W. N. 69

MISJOINDER.

See CIVIL PROCEDURE CODE

See CRIMINAL PROCEDURE CODE, s 133. 9 C. W. N. 72

MITAKSHARA.

——Ch. I, ss. 6, 7; Ch. II, s. 9; Ch. VI, s 4.

See HINDU LAW I. L. R. 32 Calc. 158, 234

MORTGAGE.

	Col
1. CONSTRUCTION OF MORTGAGE . .	261
2. POSSESSION UNDER MORTGAGE . .	266
3. REDEMPTION	266

See BANKER AND CUSTOMER 9 C. W. N. 745

See CIVIL PROCEDURE CODE, ss 263, 372 9 C. W. N. 171, 693

See CONTRIBUTION, SUIT FOR I L. R. 32 Calc 643

See DOCUMENT.

See EXECUTION OF DECREE I. L. R. 32 Calc. 494

See LEASE . I. L. R. 29 Bom. 391

See LIMITATION ACT, ss 19, 20, 21. 9 C. W. N. 868

MORTGAGE—*continued.*

See REGISTRATION ACT.
I. L. R. 32 Calc. 46

See SALE.

See STAMP ACT . I. L. R. 29 Bom. 263

See TRANSFER OF PROPERTY ACT, s. 59.
9 C. W. N. 697

See TRANSFER OF PROPERTY ACT, s. 73.
9 C. W. N. 117

See TRANSFER OF PROPERTY ACT, s. 86
9 C. W. N. 577

1. CONSTRUCTION OF MORTGAGE.

——— *Attestation, absence of—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100.*—Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act: *Held*, that it did not operate as a charge under s. 100 of the Act. *Rani Kumari Bibi* v. *Sri Nath Roy, I. C. W. N. 81*, and the observations of BANERJEE, *J.*, in *Tofaluddi Peada* v. *Mahar Ali Shaha, I. L. R. 26 Calc. 78*, approved. PRAN NATH SAREAR v. JADU NATH SAHA (1905).
I. L. R. 32 Calc. 729
s.c. 9 C. W. N. 247

——— *Equitable set-off—Redemption—Usufructuary mortgage—Accounts, mode of taking—Surplus receipts—Civil Procedure Code (Act XIV of 1882), s. 111.*—The law of equitable set-off applies where the cross claims, though not arising out of the same transaction, are closely connected together. Where, after making the payments stipulated in a deed of usufructuary mortgage, a surplus began to accumulate in the hands of the mortgagee, he would be entitled to set off against such accumulations a claim for rents subsequently accruing due to him from the mortgagor in respect of a holding owned by the latter and included in the mortgaged property, notwithstanding that such rent might be barred by limitation. *Narsingh Narain Singh* v. *Lukputty Singh, I. L. R. 5 Calc. 333*, referred to. SHEO SARAN SINGH v. MOHABIR PERSAD SHAH (1905).
I. L. R. 32 Calc. 576

———*Registered sub-mortgage—Notice—Absence of knowledge of the sub-mortgage by the mortgagor—Payment made in good faith by mortgagor to mortgagee.*—When a mortgagor makes a payment to the mortgagee in good faith without knowledge of a registered sub-mortgage, the payment is not vitiated on the ground that it was made subsequent to the registration of the sub-mortgage. Registration is notice for some purposes, but it cannot be treated as notice for the purpose of vitiating such payment. *Williams* v. *Sorrell, 4 Vesey 389*, referred to. SAHADEV v. SHEKH PAPA MIYA (1905).
I. L. R. 29 Bom. 199

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

——— *Arrangement between mortgagee and some of several mortgagors, effect of.*—The rule that an arrangement between one or more of several mortgagors and the mortgagee, whereby the former are released from their liability under the mortgage in consequence of payment of a portion of the debt or otherwise, does not affect mortgagors not parties to the arrangement, if their rights against the co-mortgagors are likely to be prejudiced thereby, has no application, where the mortgagor, who is not a party, is sought to be made liable only for his just share of the debt. Where a division of joint family property is effected by consent or by a decree of Court, an arrangement by some of the members with a mortgagee of the joint family property, by which their shares were to be released on payment of their share of the debt, is binding on members, who are not parties to the arrangement, so long as they are not called upon to pay more than their share of the debt as settled by the partition. VENKATACHELLA CHETTY v. SRINIVASA VARADA CHARIAR (1905).
I. L. R. 28 Mad. 555

——— *Mortgage of interest in tenancy in common by one of two co-tenants—Deterioration of mortgagor's interest by act of other co-tenant—Suit for damages by mortgagee against wrong-doer—Maintainability—Limitation Act (XV of 1877), Art. 49—Wrongfully removing specific property.*—*K*, who was a tenant in common with the defendant, mortgaged her interest to the plaintiff. The plaintiff instituted a suit against *K* for the recovery of the mortgage amount by sale of the mortgaged property. Pending the appeal in that suit, the defendant cut down all the trees on the land, and appropriated the same to himself. On the sale of *K's* interest in the land, which took place after the removal of the trees, the plaintiff realised only a portion of the decretal amount. The mortgagee now instituted the present suit against the defendant for the damage suffered by him by reason of the defendant having appropriated *K's* share of the wood. The suit was filed within three years of the act complained of. *Held*, that the suit was maintainable. From the time of lending his money, the mortgagee, whether in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior. *Held, also*, that the suit was not barred by limitation. It was not the act of cutting down the timber, but the subsequent appropriation of the wood by the defendant, which ought to have been left for the share of the mortgagor, that operated to the injury of the plaintiff. Limitation began to run from the date when the defendant appropriated the wood to himself. AIYAPPA REDDI v. KUPPUSAMI REDDI (1905) . . . . I. L. R. 28 Mad. 208

——— *Prior and subsequent incumbrances—Rights of puisne mortgagee paying off a prior mortgage.*—On the 2nd of June 1863 Bikram mortgaged certain property by way of simple mortgag

MORTGAGE—*continued*

1 CONSTRUCTION OF MORTGAGE—*continued*

to Narain Singh. On the 17th of June 1873 Rup Singh, one of the sons of Bikram, made a usufructuary mortgage of the property in favour of Tula Ram and Cheda Lal In 1879 Narain Singh obtained a decree on his mortgage, to which however, the second mortgagees were not parties, and the property was brought to sale and was purchased by his heirs The auction purchasers, heirs of Narain Singh, thereupon sued the second mortgagees to recover possession of the shares purchased by them and obtained a decree upon the 21st of August 1889 Thereupon the heirs of the second mortgagees sued the heirs of Narain Singh, the first mortgagees to redeem the mortgage of 1863, and got a decree on the 9th of June 1890 Finally, Kirat and another, purchasers of the interests of Rup Singh, and some of his brothers in execution of a simple money decree, sued to recover possession of the property comprised in the mortgage of 1873 upon payment only of the amount due on that mortgage. *Held* that the plaintiffs could not succeed without also paying off the amount due under the prior mortgage of 1863 KIRAT v DEBI SINGH (1905) . . . . I L R. 27 All. 308

——— *Hypothecation—Moveable property* — Although no provision has been made either in the Transfer of Property Act or the Contract Act with regard to chattel mortgages or hypothecation of moveable property, it does not follow that such transactions are invalid. *Deane* v *Richardson*, 3 *N W P* 54; *Kywalnee* v *Kokoong*, 5 *W R* 189; *Shyam Soondar* v *Chaita*, 3 *N W P* 71; *Kalka Prosad* v *Chandan Singh*, I *L. R* 10 *All* 20 referred to *Held* that in the present case the hypothecation of the moveable property was valid and conferred upon the plaintiff a good title, although not accompanied by possession SURESH CHANDRA RAY v MUNGRI BEWA (1905) 9 C W N 14

——— *Mortgage—Superior and subordinate rights existing in the same person—General words in mortgage deed effect of—Transfer of Property Act (IV of 1882), s 8—Estoppel—Evidence Act (I of 1872), ss 92 115—Judgment nunc pro tunc*— Defendant No 1 amongst other properties mortgaged a taluk, in which he had a superior zamindari right and in some villages of which he had a *subordinate sarbarakari* interest The mortgage deed did not in terms purport to pass the *sarbarakari* rights But it is found that though the *sarbarakari* tenure was never allowed to be actually merged in the superior tenure yet at the time the mortgage was created it was not known that any *sarbarakari* interest existed in these villages, but both parties understood that the entire interest in the taluk without reservation of any *sarbarakari* rights passed under the mortgage *Held* by PARGITER, *J*—That it was not open to the mortgagor, on subsequently discovering that he had the *sarbarakari* rights in these villages, to say that he had not mortgaged his entire interest in the villages, and that defendants Nos. 2 and 3, who were subsequent *bond fide* mortgagees for value of the *sarbarakari* interest, were in no better position. *Held by* WOODROFFE, *J*—That according to the rule of construction embodied in s 8 of the Transfer of Property Act, the general words used in the mortgage deed were, in the absence of reservation of either rights, sufficient to pass the entire interest of the mortgagor Appellant having died before the judgment was delivered, but after the appeal had been heard, the judgment was entered *nunc pro tunc*. GOUR CHANDRA GAJAPATI NARAYAN DEB v MAKUNDA DEB (1905) . . . 9 C. W. N. 710

MORTGAGE—*continued*

1. CONSTRUCTION OF MORTGAGE—*continued*

——— *Mortgage—Prior and puisne mortgagees—Suit by each without making other party—Successive purchase by puisne and prior mortgagees in execution—Suit by prior against puisne mortgagee for possession—Maintainability—Redemption—Lis pendens*—A first mortgagee, who had no notice of a second mortgage, brought the mortgaged properties to sale in a suit to enforce his mortgage in which the second mortgagee was not made a party and himself became the purchaser The second mortgagee had meanwhile obtained possession of the mortgaged properties, having purchased the same in a suit to enforce his own mortgage, in which he did not make the first mortgagee a party, although he had notice of his mortgage. *Held*, by MITRA, *J*. (*agreeing with* BRETT, *J*) that a suit brought by the first mortgagee against the second, in which the former prayed for possession on the failure of the latter to redeem, was properly framed and should succeed and the plaintiff ought not to be relegated to a fresh suit for sale. *Banwari Jha* v *Ramjee*, 7 *C W N* 11, approved Although the suit by the second mortgagee was instituted, whilst the proceedings in the first mortgagee's suit were still pending *Quære per* MITRA, *J*—Whether the doctrine of *lis pendens* applied HAR PERSHAD LAL v DAL MARDAN SINGH (1905) 9 C. W. N. 728

——— *Endowment, religious—Dedication—Deed of trust—Money lent out of profits of dedicated property—Right of trustee to recover—Trusteeship—Succession*—*G*, a zamindar and money lender, dedicated a part of his estate to the worship of an idol retaining the trusteeship in his own hand for his life and making provisions for the appointment of a successor in that office *Held* that a suit to enforce a mortgage brought by his duly appointed successor in the office of the trustee was maintainable, when it was found that the money advanced was part of the profits of the estate, which had been dedicated to the idol ISHANBHAR DAS v. DRIGBIJAI SINGH (1905) . 9 C W N. 914 s.c L. R 32 I. A. 172

——— *Mortgage—Sale by first mortgagee—Effect—Right of puisne incumbrancers, who were parties—Sale proceeds, lien on—Withdrawal of money by third mortgagee—Suit to enforce lien by second mortgagee—Limitation—Limitation Act (XV of 1877), Sch II, Art 132—Civil Procedure Code (Act XIV of 1882), ss 244, 295—Transfer*

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

of Property Act (IV of 1882), s. 73.—When property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances. But the rights of the puisne incumbrancers are not extinguished or discharged by the sale, but transferred thereby to the surplus sale-proceeds. Where a second mortgagee, who had been made a party in a first mortgagee's suit, took no steps to enforce his lien on the surplus sale-proceeds, but subsequently a third mortgagee, who had notice of the second mortgagee's claim, brought a suit on his mortgage without making the second mortgagee a party and drew the surplus sale-proceeds in satisfaction of his mortgage. *Held* by SALE, *J.* (agreeing with HENDERSON, *J.*), that a suit brought on his mortgage by the second mortgagee wherein he seeks to enforce his lien on the surplus sale-proceeds in the hands of the third mortgagee is governed by Art. 132 of Sch. II of the Limitation Act and not by Art. 120. *Jogeshur Bhagat* v. *Ghanasham Das, 5 C. W. N. 356,* and *Kamul Kanta Sen* v. *Abdul Barkat, I. L. R. 27 Calc. 180,* referred to. BERHAM DEO PRASAD v. TARA CHAND (1905).

9 C. W. N. 989

———*Transfer of Property Act (IV of 1882), ss. 58, 59, 100—Simple mortgage—Transfer of interest—Charge—Attestation—By one witness—Invalidity.*—A bond for the repayment of a debt contained the statement, "as collateral security for payment of the said money, I do mortgage 23 bighas, etc., etc.," but there was no statement in it showing that there was any actual transfer of any interest. *Held,* (MACLEAN, *C.J., dubitante*) that the bond amounted to a simple mortgage as defined in s. 58 of the Transfer of Property Act and not to a charge merely as contemplated by s. 100 of that Act. Such a document cannot operate as a valid mortgage, unless attested by at least two witnesses. NOBIN CHAND NASKAR *v.* RAJ COOMAR SARKAR (1905) . . . 9 C. W. N. 1001

———*Foreclosure—Sale—Notice to mortgagor—Transfer of Property Act (IV of 1882), ss. 87, 89—Order absolute for sale.*—Where an order absolute has been made under s. 87 or s. 89 of the Transfer of Property Act without notice to the mortgagor, the Court has an inherent power to deal with an application to set aside the order made *ex-parte* and can set it aside upon a proper case being substantiated. *Tara Pada Ghose* v. *Kamini Dassi, I. L. R. 29 Calc. 644,* dissented from. TASLIMAN v. HARIHAR MAHTO (1905).

I. L. R. 32 Calc. 253
s.c. 9 C. W. N. 81

———*Decree on mortgage against minors—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money decree—Title of the purchaser in execution of the decree on the mortgage—Stay of execution.—Held,* that the

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*concluded.*

doctrine *of lis pendens* does not defeat a purchase under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. *Bellamy* v. *Sabine, 41 De G. and J, 566; Wigram* v. *Buckley, 3 Ch. 483,* referred to. SHIVLAL BHAGVAN v. SHAMBHUPRASAD (1905).

I. L. R. 29 Bom. 435

2. POSSESSION UNDER MORTGAGE.

———*Successive mortgages—Sale—Rival purchasers—Possession, right to—Subsequent sale under prior mortgage—Right of purchaser—Form of suit—Lis pendens.*—Where the first mortgagee, not having notice of a second mortgage, sued the mortgagor alone and obtained a decree on his mortgage and the assignee of the decree, having in execution purchased the property, which had been previously purchased and taken possession of by the second mortgagees in execution of their subsequently obtained decree (to which the first mortgagee was not a party), on the second mortgage, sued the latter more than 12 years after the due date of the first mortgage, for possession of the property, giving them the option to redeem: *Held, per* BRETT and MITRA, *JJ.*, that he was entitled to a decree for possession on failure of the defendants to redeem. *Banwari Jha* v. *Ramjee Thakur, 7 C. W. N. 11,* followed. *Nanack Chand* v. *Taluckdye Koer, I. L. R. 5 Calc. 265; Dirgopal Lal* v. *Bolakee, I. L. R. 5 Calc. 269,* distinguished. *Held, per* RAMPINI, *J., contra,* that the plaintiff was not entitled to possession, the right to possession depending on the priority of purchase and not on the priority of mortgage; and as the suit was not one on his mortgage lien and as his right to bring a suit to enforce such lien was barred by limitation, the plaintiff was not entitled to ask to be redeemed. *Per* MITRA, *J.*—The title of a purchaser at a sale in execution of a mortgage decree relates back to the date of the mortgage and the defendant's mortgage being prior in date to the suit on the first mortgage, their purchase was not affected by the pendency of that suit. *Syud Emam Montazuddeen Mahomed* v. *Raj Coomar Dass, 23 W. R. 187,* referred to. *Per* BRETT, *J.*—The defendants were bound by the doctrine of *lis pendens.* HAR PERSAD LAL v. DALMARDAN SINGH (1905).

I. L. R. 32 Calc. 891

3. REDEMPTION.

———*Prior and subsequent incumbrances—Sale under decree on puisne mortgage notifying prior incumbrances—Purchase by decree-holder—Prior incumbrances declared invalid—Suit by owner to recover from decree-holder auction-purchaser the amount due on the prior incumbrances.—*

MORTGAGE—*continued*

3. REDEMPTION—*continued*

—Certain villages were put up to sale in execution of a decree under s 88 of the Transfer of Property Act 1882, and it was notified in the proclamation of sale issued under s 287 of the Code of Civil Procedure that there were two prior mortgages on the property to be sold of the 25th of May and the 2nd of December 1877, respectively The holder of the decree under execution obtained leave from the Court to bid at the sale, and purchased eight villages at a very low figure *Meanwhile, as the result of* suits on the two mortgages of 1877, those mortgages were declared to be invalid. Subsequently the person entitled to the proprietary rights in the mortgaged property sued to recover from the auction purchaser and her representatives in interest the amounts due on the two mortgages of 1877 *Held* by STANLEY, *C.J.*, and BLAIR, *J* (*dissentiente* BURKITT, *J*), that what the decree-holder auction purchaser purchased was only the equity of redemption in the mortgaged property and not the whole of the proprietary rights therein The prior mortgages of 1877 having been found to be invalid the rightful owner of the property was in equity entitled to recover from such purchaser of the equity of redemption such amount of the principal and interest secured by those mortgages as was proportionate to the value of the property the equity of redemption in which had been purchased *Sumbhu Nath Pan day v Golab Singh, L. R. 14 I. A. 77; Pethachi Chettiar v Sangili Veera Pandia Chinnathambiar, L. R. 14 I. A. 84* and *Abdul Aziz Khan v Appayasami Naicker, L. R. 31 I. A. 1* referred to. *Per* BURKITT *J*, *contra*—Whether or not in a properly framed suit tendering the amount due on the auction purchaser's mortgage and the amount paid by the auction purchaser for the property bought by her the plaintiff could recover possession of the property mortgaged in the present suit, which was framed as a suit for the recovery of unpaid purchase money, no decree for the payment of the amounts due on the prior mortgages could be passed. A notification by a Court executing a decree for sale of immovable property that the property about to be sold is incumbered does not guarantee that the incumbrances notified are valid incumbrances or that they are the only incumbrances on the property; nor in this case was there anything in the conduct of the auction purchaser, which estopped her from denying the validity of the prior mortgages The auction purchaser was entitled to retain the benefit of the bargain, which she had secured. INAYAT SINGH v IZZAT UN NISSA BEGAM (1905) . I. L. R. 27 All. 97

———*Limitation Act (XV of 1877), Sch. II, Art 179—Decree for redemption—Extension of time for payment of the mortgage amount—Execution*—In a suit for redemption of the mortgage property the decree directed that upon payment of the mortgage amount within six months from its date, the decree holder should take possession of the mortgage property The decree was affirmed on appeal on the 6th November 1896 The decree-holder failed to pay the amount within the time fixed in the decree The present application was made on the 15th October 1902 to the Court to have the time extended for three months The decree-holder's last application to execute the decree was made on the 21st April 1897 *Held* that the application was barred by limitation Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by Art 179, Sch. II of the Limitation Act. *Rungiah Gounden v Nanyappa Row, I. L. R. 26 Mad 780*, approved. PUTATI POOPARAMBIL BAVA v. MATALAKAT KRISHNA MENON (1905) . . . I. L. R. 28 Mad 211

———*Redemption—Execution of decree—Redemption money paid into Court, but part subsequently withdrawn in execution of plaintiff's decree for costs*—Where the full amount fixed by the Court in a decree for redemption of a mortgage was paid into Court within the time limited by the decree, it was held that the plaintiff's mortgagors did not lose their right to possession of the mortgaged property by the fact of their having attached and withdrawn from Court a portion of the sum so paid in execution of their decree for costs of the suit PARMANAND v LUXMAN DAS (1905) I. L. R. 27 All. 392

———*Usufructuary mortgage followed by lease to mortgagor—Suit for redemption—Arrears of rent sought to be included in the mortgage debt—Diminution of security—Acquiescence of mortgagee in loss of part of the security*—The day after the execution of a usufructuary mortgage, the mortgagor entered into an agreement with the mortgagees to rent the mortgaged premises from them The kabuliat executed in pursuance of this agreement provided that the rent, a fixed annual payment, should be charged on the property leased, but the kabuliat was neither executed nor registered on the same day as the mortgage, nor were the terms of the two instruments coincident *Held* that the two transactions must be treated as separate, and the mortgagor could not be compelled, as a condition precedent to redemption of the mortgage, to pay off the charge created by the kabuliat. *Tayyo Bibi v Bhagwan Prasad, I. L. R. 16 All. 295*, referred to At the time of the mortgage one of the mortgaged villages was the subject of a suit for pre-emption, which was ultimately successful and the village passed out of the hands of mortgagees. The mortgagees, however, made no effort to obtain any equivalent from the mortgagor, but remained in possession of the rest of the mortgaged property for some years, apparently satisfied with the security *Held* that the mortgagees were not under the circumstances entitled to claim anything from the mortgagor on redemption on account of the rents and profits of the village of which they had been so deprived *Partab Bahadur Singh v Gajadhar Bakhsh Singh, L. R. 29 I. A. 149; s. c. I. L. R. 24 All. 521*, referred to KHUDA BAKHSH v ALIM UN NISSA (1905) I. L. R. 27 All. 313

———*Mortgagor and mortgagee—Redemption, equity of—Adverse possession by mortgagee*

MORTGAGE—*continued.*

3. REDEMPTION—*continued.*

—Effect—Purchase by mortgagee at Court sale—Validity—Execution sales, validity of—Jurisdiction, want of—Irregularity—Deceased debtor's estate—Legal representative and guardian of minor set up by creditor accepted by Court without enquiry—Nullity.—A mortgagee in possession purchased the mortgaged properties through benamdars at certain execution-sales and resisted a suit for redemption on the ground that since the date of these sales, no accounts had been demanded by or rendered to the mortgagor and that the mortgagee was in adverse possession of the equity of redemption: *Held*, overruling the plea, that as between mortgagor and mortgagee, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, would be a bar or defence to a suit for redemption, if the mortgagor be otherwise entitled to redeem. The view that a mortgagee cannot acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage, is based on a misapplication of a sound principle of equity. That principle is—that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligation as mortgagee or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on a mortgage. A sale taking place in contravention of the above principle cannot be treated as a nullity as the irregularity is one of procedure only. Sales in execution of decrees cannot be treated as void on grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But a Court has no jurisdiction to sell the property of persons, who were not parties to the proceeding or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. *Kishen Chunder Ghose* v. *Mussumat Ashoorun, Marshall 647*, followed. A suit, which purported to be brought against one "*N*, deceased, by his legal representative *A*, by his guardian, his uncle *A N*" was decreed, the Judge accepting, without question and without applying his mind to the matter, the statement that *A* (who was a son of *N*, and a minor) was the legal representative of *N* and *A*. *N* was his guardian. *N's* properties were sold in execution of this decree. *Held*, that the estate of *N* was not represented in law or in fact in the suit and therefore the sale of his property was without jurisdiction and null and void; and that the share of *A* himself in *N's* estate was not bound. *Malkarjun* v. *Narhari, 5 C. W. N. 10: s.c. L. R. 27 I. A. 216*, distinguished. KHIARAJMAL v. DIAM (1905).

9 C. W. N. 201
s.c. L. R. 32 I. A. 23

——— *Redemption, clog on—Contract to pay off subsequent mortgages before redeeming prior mortgage—Validity—Contract to pay off an unsecured debt—Transfer of Property Act (IV of 1882), s. 61.*—In a suit for redemption by a mortgagor the mortgagee set up by way of defence a contract entered into at the time of the execution of four bonds of later dates, to the effect that the mortgage in suit was not to be redeemed without paying off the sums due under the subsequent bonds. One of these bonds was a simple bond, the others mortgage bonds secured on the same property. *Held* that, so far as these mortgage bonds were concerned, the contract was enforceable and must be given effect to, but as regards the simple bond the contract was a clog on the equity of redemption and was not enforceable. DURGA PERSHAD v. DUKHI ROY (1905) . . 9 C. W. N. 789

MORTGAGE—*continued.*

3. REDEMPTION—*continued.*

——— *Purchase from heir during administration suit - Rival mortgagees—Priority of title—Purchaser from Receiver in administration suit—Purchaser at sales in execution of mortgage decree—Transfer to benamidar, pendente lite—Transfer of Property Act (IV of 1882), ss. 52, 53.*—When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition, which has been or may be made of the deceased's estate in due course of administration: the right of the residuary legatee or heir being only to share in the ultimate residue, which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. As between the appellant and respondent, who were rival mortgagees of the property of a Muhammadan family, the Judicial Committee, reversing the decision of the High Court, upheld the title of the appellant, who represented a purchaser at sales by the Receiver of the High Court in a suit for administration of the estate of one of the mortgagors, as entitled to priority over that of the respondent, who claimed through a purchaser in execution of the mortgage decree at sales, which took place pending the administration suit, in one case after the order for sale by the Court and in another after the actual sale by the Receiver in that suit. The shares of all the heirs to the mortgagor's estate were, pending the suit for administration, purchased at private sales by the appellant in the name of, and were transferred to, a benamidar, who was made a party defendant in the appellant's mortgage suit and a party plaintiff in the administration suit. *Held*, that the appellant being, in execution of the decree in the mortgage suit, alone represented on each side of the record, could not rely on the sale effected in such circumstances in support of his title, or derive any advantage therefrom. *Held*, also [without deciding whether such transfers could be avoided under s. 52 or 53 of the Transfer of Property Act (IV of 1882) in a properly constituted suit], that the appellant must be treated as the transferee for value of the entire equity of redemption, and that the respondent, therefore, had not made out any title to redeem the appellant's mortgage, notwithstanding the subsequent

MORTGAGE—*concluded*

3 REDEMPTION—*concluded*

sale in his mortgage suit under which he claimed CHATTERPUT SINGH v MAHARAJ BAHADUR (1905)
I. L. R. 32 Calc 198

MORTGAGE LIEN.

——— *Collusive decree—Fraud—Landlord and tenant—Sale for arrears of rent—Right of suit*—When a landlord, in collusion with his tenant, obtained a decree for rent, and in execution thereof purchased the holding, the lien of a mortgagee under the tenant of a part of the holding should be held to continue to subsist upon the land, and the mortgagee would have the same right against the landlord as he would have against the mortgagor RAM SARAN DAS v RAM PERGASH DAS (1906)
I. L. R. 33 Calc. 263

MORTGAGE SUIT.

See PRACTICE

MOVEABLE PROPERTY.

See LETTERS PATENT

MULAGENI CHIT.

See TRANSFER OF PROPERTY ACT.

MULRAIYAT

——— *Incidents of a mulraiyati tenure—Right to split up such a tenure—Suit for ejectment by a mustagir*—A *mulraiyat* is a village headman or settlement holder, whose rights are in their entirety transferable and attachable The privilege which the *mulraiyat* possesses, of transferring his tenure, must be exercised in respect of the whole tenure at the same time, in other words, if he chooses to transfer his tenure, he must alienate the whole of his rights in the village, including his right of managing the village and collecting the rent as also his right to the land in his possession He cannot *split up the tenure so as to part with a portion and* retain the remainder Therefore a person who purchases only a portion of the tenure acquires no right as *mulraiyat* and is liable to be evicted by the *mustagir* of the village in the absence of a finding that he has a right as an ordinary raiyat. DARBARI PANDARA v BENI RAI (1905)
I. L. R. 32 Calc. 1014

MULTIFARIOUSNESS

——— *Joinder of parties—Multifariousness—Suit, if to be confined to plaintiff's rights—Plaintiff seeking adjudication of the claims of others, with his own suit, if maintainable—Suit by secured creditor of partnership—Priority over separate creditors—Other secured creditors, if necessary parties*—A plaintiff can sue to establish his own rights only and has no right to obtain an adjudication of the claims of any

MULTIFARIOUSNESS—*concluded*

defendants, unless such adjudication be necessary to give him the appropriate relief to which he *is entitled The plaintiff, alleging that he was a* joint and secured creditor of an alleged partnership, sued to establish his priority of recourse against the partnership assets of his debtors over the separate creditors of the individual partners He, however, made other alleged joint and secured creditors, defendants Nos. 8 to 12 and 14 to 18, party-defendants to the suit. *Held*, that the suit, in so far as it sought an adjudication of the rights of the defendants as between themselves, and in particular, in so far as it sought to affirm the right of the defendants Nos. 8 to 12 and 14 to 18 to priority of payment over the separate creditors, was not maintainable. WOOPENDRA NARAIN SEN v. AGHORE NATH CHATTERJEE (1905) . . 9 C. W. N. 493

MUNICIPAL BOARD.

See ACT XI OF 1883, s 40

MUNICIPAL COMMISSIONER.

See BOMBAY MUNICIPAL ACT.

See MUNICIPAL ACT.

9 C. W. N. 678

MUNICIPAL MAGISTRATE.

See MUNICIPAL ACT.

MUSTAGIR.

See MULRAIYAT.

MUTWALL.

See MAHOMEDAN LAW.

N

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss 9, 58

See LIMITATION

O

OCCUPANCY RIGHT.

See BENGAL TENANCY ACT

ONUS OF PROOF.

See PRIVATE INTERNATIONAL LAW

——— *Domicile of origin—Abandonment—Acquiring fresh domicile—Onus of proof—Immoveable property, rights over*—The person, who attacks a settlement on the ground of nationality, must show conclusively that the nationality of the

ONUS OF PROOF—*concluded.*

settlor was foreign, and, if he succeeds in doing so, the onus is then shifted upon the person supporting the settlement to show that the settlor had acquired a fresh domicile in British India, and that his estate ought to be administered according to Indian law. All rights over immoveable property are governed by the law of the country, where the property is situate, this principle being universally recognised. *De Nicols* v. *Curlier, A. C. 21; In re De Nicolas, 2 Ch. 410,* dissented from. A. L. BONNAUD v. EMILE CHARRIOL AND OTHERS (1905).

I. L. R. 32 Calc. 631

ORDER.

See DECREE.

OUSTER.

See ADVERSE POSSESSION.

P

PACHIS SAWAL.

See HINDU LAW . I. L. R. 32 Calc. 158
9 C. W. N. 330

See RIGHT OF SUIT.
I. L. R. 32 Calc. 273

PAHARAJ.

See HINDU LAW.

PAKKA ADAT SYSTEM.

See PRINCIPAL AND AGENT.

PALAYAM, NATURE OF.

See HINDU LAW.

PANNA, MAHARAJAH OF.

See PRIVY COUNCIL APPEAL.

PARTIES.

See BENGAL TENANCY ACT.
9 C. W. N. 34

See HINDU LAW . 9 C. W. N. 829, 1033

See MAGISTRATE.
I. L. R. 32 Calc. 287

See PRACTICE . I. L. R. 32 Calc. 746

——— *Partition, suit for—Civil Procedure Code (Act XIV of 1882), s. 32—Pending litigation—Addition of party after the decree, but before it is engrossed on stamp paper—Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45.*—A suit for partition, even when the report of the Commissioners is confirmed and a decree is directed to be drawn in

PARTIES—*continued.*

accordance therewith, is a pending litigation, until the Court signs the final decree. A decree for partition, to be operative, must be engrossed on stamped paper as required by the Stamp Act, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated; and an order directing a party to be added under s. 32 of the Civil Procedure Code can be made in such a suit before it has actually terminated. *Lingammal* v. *Chinna Venkatammal, I. L. R. 6 Mad. 227; Mihin Lal* v. *Imtiaz Ali, I. L. R. 18 All. 332; Oriental Bank Corporation* v. *Charriol, I. L. R. 12 Calc. 642; Heard* v. *Borgwardt, W. N. 173;* and *Keith* v. *Butcher, L. R. 25 Ch. D. 760,* discussed. JOTINDRA MOHAN TAGORE v. BEJOY CHAND MAHATAP (1905).

I. L. R. 32 Calc. 483

——— *Limitation—Debutter property—New defendant—Limitation Act (XV of 1877), s. 22—Civil Procedure Code (Act XIV of 1882), s. 32—Sebait—Right of, to be indemnified.*—Where relief is originally claimed against a party, who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a new "defendant" to the suit. Plaintiffs instituted a suit praying *inter alia* for a decree for a sum of money against a *debutter* estate, the defendants to the suit being, among other persons, *P*, who was impleaded as Receiver of the *debutter* estate and also in his personal capacity; no one of the defendants was impleaded as representing the *debutter* estate. Subsequently and after the expiry of the period of limitation prescribed for the suit, the plaint was amended and *P* was impleaded also as *sebait* and representing the *debutter* estate. *Held,* that this was not adding a new defendant to the suit, and that the claim against the *debutter* estate was not barred by limitation. *Khem Karan* v. *Har Dayal, I. L. R. 4 All. 37; Prosunno Kumar Sen* v. *Mahabharat Saha, 7 C. W. N. 575,* approved. *Imamuddin* v. *Liladhar, I. L. R. 14 All. 524; Weldon* v. *Neal, 19 Q. B. D. 394; Manni Kasaundhan* v. *Crooke, I. L. R. 2 All. 296,* referred to. A *sebait,* who is obliged to pay money of his own for the benefit of the *debutter* estate, is entitled to have the same made good out of the estate. PEARY MOHAN MUKERJEE v. NARENDRA NATH MUKERJEE (1905) . . . . I. L. R. 32 Calc. 582
s.c. 9 C. W. N. 421

——— *Appeal—Estoppel—Procedure.*—*Held,* that when a suit has been dismissed against one of two defendants by the Court of first instance and the defeated plaintiff has not appealed against that part of the decree, the addition of the defendant, against whom the suit has been dismissed, to the array of parties does not empower the appellate Court to pass against him a decree, which the Court of first instance declined to pass, and in the decision of which Court the plaintiff chose to acquiesce. *Ranjit Sing* v. *Sheo Prasad Ram, I. L. R. 2 All. 457,* and *Atma Ram* v. *Balkishen, I. L. R. 5 All. 266,* followed. *Rup Jan Bibee* v. *Abdul Kader Bhuyan, 8 C. W. N. 496,* dissented from. FARZAND ALI KHAN v. BISMILLAH BEGAM (1905) . . I. L. R. 27 All. 23

PARTIES—*concluded*

——— *Parties—Mortgage suit—Transfer of Property Act (IV of 1882), s 85.*—Part owners of a mortgaged property, who did not execute the indenture of mortgage and did not receive the money and were not interested in the equity of redemption are not necessary parties to a suit to enforce the mortgage. MOY MOHINI GHOSE v PARVATI NATH GHOSE (1905) . . I. L. R. 32 Calc 746

PARTITION.

See CIVIL PROCEDURE CODE

See HINDU LAW

See JURISDICTION

See LETTERS PATENT

See PARTIES

——— *Partition, suit for—Right of suit—Division to be final—Right of person holding temporary or qualified interest*—Partition should not be allowed, when the interests of one or more of the persons owning interests in the property to be partitioned is of a temporary and qualified character, and when there may be apprehension that the division effected may not have an enduring effect. A *mokurari* lease, which was by its terms to become null and void on default of payment of three instalments of the *mokurari* rent, as also upon alienation by the *mokurardar*, was not such a permanent or transferable interest as would ensure that any division that might be effected would be of enduring effect. BEPIN BEHARI MITTER v. LALA BHAGWAT SAHAI (1905)
9 C. W. N. 699

PARTITION SUIT.

See CIVIL PROCEDURE CODE

See EXECUTION

See PARTITION.

PARTNERSHIP.

See LIMITATION ACT.
9 C. W. N. 537

See MULTIFARIOUSNESS 9 C. W. N. 493

PARTNERSHIP PROPERTY.

——— *Partnership property, dispute relating to the management of—Criminal Procedure Code (Act V of 1898), s 145—Possession as managing partner.*—A dispute between partners claiming exclusive possession of the partnership property as managers is outside the purview of s 145 of the Criminal *Procedure Code* RADHA RAMAN GHOSE v BALIRAM RAM (1905) . . . I. L. R. 32 Calc 249

PATIA RAJ.

See HINDU LAW—ADOPTION.

PATNI

See CONTRIBUTION, SUIT FOR

See LIMITATION

PAUPER.

——— *Civil Procedure Code (Act XIV of 1882), ss 373, 412—Suit—Withdrawal of a suit with permission to bring fresh suit—Failure in the suit—Adjudication—Court fees, payment of*—Where a pauper plaintiff withdraws a suit with permission to bring a fresh suit he is liable to pay to the Government the Court fees, which would have been paid by him, if he had not been permitted to sue as a pauper. The words "if the plaintiff fails in the suit" in s. 412 of the Civil Procedure Code (Act XIV of 1882) apply to the withdrawal of a suit under the provisions of s. 373 of the Code SECRETARY OF STATE v NARAYAN BALKRISHNA (1904)
I. L. R. 29 Bom. 102

PEDIGREE.

See EVIDENCE.

PENAL CODE (ACT XLV OF 1860)

——— *ss. 21, 161—Clerk to a Sub-Registrar—Illegal gratification—Registration Act (III of 1877) ss 6 to 14, 69 84*—A clerk appointed by a Sub-Registrar, and paid out of an allowance given to the Sub-Registrar is not a "public servant" within the meaning of s 21 of the Penal Code BHAGWATI SAHAI v EMPEROR (1905)
I. L. R. 32 Calc. 664

——— *s 99—Right of private defence of body—Extent of right*—The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger, but on whether there was *reasonable apprehension of such danger* ALINGAL KUNHIMAYAN v. EMPEROR (1905)
I. L. R. 28 Mad. 454

——— *ss 99, 147—Private defence, right of—Police officer executing illegal order of Magistrate—Attachment of crops—Criminal Procedure Code (Act V of 1898), s 145*—Although an order to the Police purporting to be made under s 145 of the Code of Criminal Procedure, directing them to take charge of some crop in dispute may not be strictly legal, yet when in execution of such order the police went to the spot where the crop was stored and after announcing the order simply proposed to guard it *Held* that the accused in seizing several men of the police party and carrying them off into confinement had exceeded their *right of private defence*. *Dhai Lal Chowdhry v. Emperor*, 6 C. W. N 680, s c I L R 29 Calc 417; *Queen-Empress v Jogendra Nath Mukerjee*, I L. R. 24 Calc 320; *Adhar Midday v The Empress*, 5 C W. N 391, *Uma Charan Singh v The King-Emperor*, 6 C W. N. 164, referred to BROLA MAHTO v EMPEROR (1905)
9 C. W. N. 125

——— *ss. 114, 199, 466—False declaration—Registrar of Mahomedan marriages if bound or*

PENAL CODE (ACT XLV OF 1860)—*continued.*

authorised to take evidence—Forgery of public register—Abetment—Jury—Misdirection.—Where one *X* by personating *P* before the Mahomedan Registrar of Marriages, obtained the registration of *P's* divorce from his wife, and the appellant identified *X* as *P* before the Registrar: *Held*, that the appellant was not guilty of an offence under s. 199 of the Penal Code, inasmuch as the Registrar was not bound or authorised by law to receive his statement in evidence. But whether he was guilty of an offence under s. $\frac{199}{114}$ of the Penal Code would depend chiefly on whether he knew that *X* was not *P* or had no knowledge whether he was *P* or not. *Held*, that the Judge had fairly put the evidence on this point to the jury. YASIN SHEIKH (AKONDA) *v.* EMPEROR (1905).
9 C. W. N. 69

——— s. 161.

See ILLEGAL GRATIFICATION.
9 C. W. N. 292

——— s. 161 — *Demand of dusturi by Civil Court peon.*—A demand of *dusturi* by a Civil Court peon from the plaintiff, as a motive or reward for serving the summonses on his witnesses without an identifier, amounts to an attempt to obtain an illegal gratification within s. 161 of the Penal Code. *Empress of India* v. *Baldeo Sahai, I. L. R. 2 All. 253*, followed. *Queen-Empress* v. *Ramakka, I. L. R. 8 Mad. 5*, distinguished. RATAN MONI DEY *v.* EMPEROR . . I. L. R. 32 Calc. 292
s.c. 9 C. W. N. 547

——— s. 170—*Personating a public servant—Definition.*—*Held*, that to constitute the offence provided for by s. 170 of the Penal Code it is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated. *Queen Empress* v. *Wazir Jan, I. L. R. 10 All. 58*, referred to. EMPEROR *v.* AZIZ-UD-DIN (1905).
I. L. R. 27 All. 294

——— s. 182.

See CRIMINAL PROCEDURE CODE, s. 517.
9 C. W. N. 597

——— s. 182—*Criminal Procedure Code (Act V of 1898), ss. 154, 162—False information to a Village Magistrate.*—An offence under s. 182 of the Penal Code is committed by a person giving false information to a village Magistrate charging another with having committed an offence. Where such information is given with the view of its being passed on to the Station-house Officer, who, on receiving the information, takes a complaint in writing, from such informant, the complaint is one taken under s. 154 and not under s. 162 of the Criminal Procedure Code. *The Queen* v. *Perriannan* and *The Queen* v. *Naraina, I. L. R. 4 Mad. 241*, distinguished. EMPEROR *v.* JONNALAGADDA VENKATRAYUDU (1905) . . . I. L. R. 28 Mad. 565

——— ss. 182, 211.

See SANCTION FOR PROSECUTION.
9 C. W. N. 180

PENAL CODE (ACT XLV OF 1860)—*continued.*

——— s. 183—*Attachment—Warrant not in the possession of the amin at the time of making the attachment—Lawful authority.*—It is the intention of the law that, when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful. *Empress of India* v. *Amar Nath, I. L. R. 5 All. 311*, referred to. EMPEROR *v.* GANESHI LAL (1905).
I. L. R. 27 All. 258

——— s. 184—*Agra Tenancy Act (II of 1901), s. 134—Distraint—Sale adjourned owing to absence of bidders—Obstruction to sale on adjourned date.*—The law as laid down in Chapter IX of the Agra Tenancy Act, 1901, does not authorise the adjournment of a sale of distrained property owing to the absence of bidders. Hence where for this reason an amin adjourned a sale and fixed a fresh date, and obstruction was offered to the sale so adjourned, it was *held* that the persons so obstructing the sale could not be convicted under s. 184 of the Penal Code. EMPEROR *v.* TARA SINGH (1905) . . . . I. L. R. 27 All. 480

——— s. 186—*Northern India Canal and Drainage Act, VIII of 1873, ss. 45 and 47—Mode of collection of canal dues—Distraint.*—Where under a written order signed by a Tahsildar the Naib Nazir was directed to realize certain canal dues, and he, on attempting to do so by attachment and sale of the defaulter's property, was resisted by the owners of the property, it was *held* that the conviction of the persons offering resistance under s. 186 of the Penal Code was good. The Tahsildar's order, though not of a formal nature, was sufficient evidence that the Naib Nazir was acting as a public servant in the discharge of his duty. *Held* also, that the appointment of lambardars does not preclude the Revenue authorities, if they think fit, from realizing canal dues from the persons, by whom the dues are actually payable. *Queen-Empress* v. *Poomalai Udayan, I. L. R. 21 Mad. 296*, referred to. EMPEROR *v.* ABDULLAH (1905)
I. L. R. 27 All. 496

——— s. 188.

See BREACH OF THE PEACE.
9 C. W. N. 793

——— s. 188.

See CRIMINAL PROCEDURE CODE, s. 144.
9 C. W. N. 382

——— s. 188—*Disobedience of order—Evidence—Criminal Procedure Code (Act V of 1898), s. 144.*—To constitute an offence under s. 188 of the Penal Code of disobedience to an order issued under s. 144 of the Criminal Procedure Code, there must be *definite* evidence on the record to show that such disobedience is likely to lead to a breach of the peace. *Brajo Nath Ghose* v. *Empress, 4 C. W. N. 226.* RAM GOPAL DAW *v.* EMPEROR (1905).
I. L. R. 32 Calc. 793

PENAL CODE (ACT XLV OF 1860)—*continued*

——— ss 191, 193, cl. (3)—*Proceeding under Land Registration Act (Bengal Act VII of 1876), ss 52, 53, 54—Witness if "bound to state truth" in such proceeding—Criminal Procedure Code (Act V of 1898), s 195—Sanction to prosecute*—In a proceeding held by a Sub-Deputy Collector under ss. 52 and 54 of the Land Registration Act, a witness is "bound to state the truth" within the meaning of s 191 of the Penal Code, and a person who made a false statement before the Sub-Deputy Collector, would be rightly convicted, under the latter part of s 193 of the Penal Code, even if the proceeding was not a judicial proceeding within the meaning of that section. *Quære*—Whether the Sub Deputy Collector was a "Court" within the meaning of s 195 of the Code of Criminal Procedure, and the proceeding was a "judicial proceeding" within the meaning of s 193 of the Penal Code. HIRANAND OJHA v EMPEROR (1905) 9 C. W. N. 983

——— s. 193.

See CRIMINAL PROCEDURE CODE, ss 133, 342, 488 9 C. W. N. 983

——— s 193

See CRIMINAL PROCEDURE CODE, s 195 9 C. W. N 321

——— s. 193—*Giving false evidence—Deposition of witness upon which assignment of perjury based not taken in manner required by law—Conviction—Unsustainability of*—A was convicted of giving false evidence in a judicial proceeding. It was proved that after his evidence had been recorded, his deposition, upon which the assignments of perjury were based, was read over to him by the Court clerk, in a place where neither the Judge nor vakils were present. *Held*, that the conviction could not be sustained. The deposition upon which the prosecution was based not being properly taken in accordance with law, should not have been admitted in evidence. RAMATCHI NATHAN CHETTY v. EMPEROR (1905) I. L. R. 28 Mad. 309

——— ss 225B, 353—*Rescue from lawful custody—Legality of warrant—Civil Procedure Code, ss 82, 174*—An Assistant Collector issued warrants for the arrest of certain witnesses, for whose attendance summonses had been issued, but who had not appeared in obedience thereto. The serving officer had not been able to effect personal service of the summonses, but had affixed copies to the houses of the persons to be served. The Court previous to issuing warrants did not comply with the provisions of s. 82 of the Code of Civil Procedure, though it was apparently of opinion that there had been due service of the summonses. The officers charged with the execution of the warrants arrested one of the witnesses, but they were attacked by *N* and others and the man they had arrested was rescued. *A* was convicted under ss 225B and 353 of the Penal Code. *Held* that, even if s 225B was not applicable the conviction under s. 353 of the Code was perfectly justified. EMPEROR v NAR BADESWAR (1905) . . I. L. R. 27 All. 491

PENAL CODE (ACT XLV OF 1860)—*continued.*

——— ss. 232 and 235—*Search of premises of suspected coiners—Evidence—Prosecution, duty of, to examine persons present at search.*—The fact that the prosecution believed that some persons, who were present at a search, had formed an opinion unfavourable to the prosecution story regarding it, is no reason why those persons should not be called by the prosecution, inasmuch as what those persons would be required to state in their depositions was what they observed and not what they thought. The prosecution is in duty bound to call the persons, who were present, unless they were of opinion that those persons would misrepresent facts and would misstate what happened. MUNUI SONAR v EMPEROR (1905) 9 C. W. N. 438

——— s. 304A.

See RAILWAY COLLISION. 9 C. W. N. 73

——— ss. 361, 363.

See KIDNAPPING FROM LAWFUL GUARDIANSHIP . . 9 C. W. N. 444

——— s. 379—*Theft—Claim of title—Bond fides—Jurisdiction of Criminal Court—Servant, act committed by, at master's bidding—Guilty knowledge, proof of—High Court—Jurisdiction in revision—Finding of fact of lower Court, interference with*—Although, as a rule, the findings of fact of the lower tribunal are accepted by the High Court in revision cases, there are exceptions. One must be careful to see that the criminal law is not put in motion with a view to assistance in the prosecution of a civil claim. The Criminal Courts should not convict of theft any person, who asserts a claim of right, unless it is in a position to say that that claim is a mere pretence. A servant should not be held guilty of the offence of theft, when what he did was at his master's bidding, unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred. HARI BHUIMALI v EMPEROR (1905) 9 C. W. N 974

——— s. 379—*Theft—Dishonest taking—Bond fide claim of ownership by accused over property in possession of third party—Disputed ownership of land—Possession summarily taken by Revenue authorities—Province of Civil Courts to decide question of ownership between Government and private persons*—The petitioner was convicted of theft of certain bamboos, which he said he cut on his own patta land, but which the prosecution alleged he cut on Government poramboke land adjacent to his own. Prior to his conviction, disputes had arisen between the Revenue authorities and the petitioner regarding the ownership of the land. The petitioner contended that he *bonâ fide* believed the bamboos to be his property at the time he cut and removed them. The Magistrate, finding that the Revenue authorities had taken possession of the land at the time the bamboos were removed, convicted the petitioner. *Held*, that the conviction

PENAL CODE (ACT XLV OF 1860)—*continued.*

was wrong. The questions to be considered were, (1) whether the bamboos did in fact belong to the petitioner or to Government; (2) whether, if they did not belong to the petitioner, he *bonâ fide* believed they did. It is the province of the Civil Courts to decide questions of ownership of land between Government and private parties, and if the Revenue authorities take summary possession of land as in the present case, they become mere trespassers and there is nothing dishonest in the owner taking possession of his own property. ALGARASAWMI TEVAN v. EMPEROR (1905) . . I. L. R. 28 Mad. 304

——— s. 405—*Criminal breach of trust—Definition.*—A clerk in a record-room made over a document forming part of a record in his custody to a person, who was entitled to the document, but who would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. *Held*, that the clerk was under the above circumstances rightly convicted under s. 409 of the offence of criminal breach of trust by a public servant. EMPEROR v. GANGA PRASAD (1905).
I. L. R. 27 All. 260

——— s. 405—*Criminal breach of trust—"Property"—Cancelled cheques.*—*Held*, that a cancelled cheque falls within the meaning of the term "property" as used in s. 405 of the Penal Code, even if it is worth no more than the value of the paper upon which it is written. In the matter of a conviction for criminal breach of trust the question of the value of the property in respect of which the breach of trust is committed is, except so far as s. 95 of the Code is concerned, quite immaterial. EMPEROR v. MAULA BAKHSH (1905).
I. L. R. 27 All. 28

——— s. 409.

See CRIMINAL PROCEDURE CODE.
I. L. R. 27 All. 69

——— s. 415.

See CHEATING . . 9 C. W. N. 941

——— s. 415—*Deception—False representation—Conduct.*—To constitute the offence of cheating under s. 415 of the Penal Code, it is not necessary that the deception should be by express words, but it may be by conduct, or implied in the nature of the transaction itself. *Queen* v. *Sheodurshun Dass, 3 All. H. C. 17*, referred to KHODA BUX v. BAKEYA MUNDARI (1905) . . I. L. R. 32 Calc. 941
s.c. 9 C. W. N. 1006

——— s. 415—*Cheating—Definition—Sale of immoveable property without mentioning incumbrances.*—The vendor of immoveable property cannot be convicted of cheating because he omits to mention that there is an incumbrance on the property, unless it is shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered. *Horsfall* v. *Thomas, 31 L. J. Ex. 322*, referred to. EMPEROR v. BISHAN DAS (1905).
I. L. R. 27 All. 561

PENAL CODE (ACT XLV OF 1860)—*continued.*

——— ss. 415, 417, 511—*Attempt to cheat—Coolie recruiting—Attempt under s. 511.*—The accused, a coolie recruiter, induced the complainant to come to a coolie depôt and promising him domestic service entered his name in the books of the depôt and wrote a letter to a coolie contractor in Calcutta offering the complainant as a coolie; on the same day the accused persuaded the complainant to go to the railway station to fetch a parcel and there the accused bought a railway ticket for Calcutta for the complainant and tried to get him to enter the train, but the complainant refused to go. The object of the accused was to get the complainant to go to Calcutta that he might be sent from there to Assam as a tea garden coolie. *Held*, that the acts of the accused amounted to an attempt to cheat and therefore the conviction under ss. 417 and 511 of the Penal Code was right. KISHORI LAL CHATTERJI v. EMPEROR (1905) . . . . . 9 C. W. N. 764

——— ss. 415, 419—*Cheating by personation—Personation—Minors.*—On an application by the *kurta* of a joint Hindu family, in his representative character, to withdraw certain surplus sale-proceeds standing to their credit in the Treasury, the Collector directed him either to file a power of attorney or to cause all the other members to appear and admit his authority to sign on their behalf. They all appeared in person before the sheristadar, except two minors, who were personated by other persons, and signed receipts for the money and caused the personators to sign in the names of the minors. Thereupon the Collector, after inspecting the signatures, issued a bill in their favour for the amount due, which they withdrew. *Held*, that upon the facts the offence of cheating was not made out. *Reg.* v. *Longhurst*, unreported. *In re Loothy Bewa, 11 W. R. Cr. 24*, referred to. BABURAM RAI v. EMPEROR (1905).
I. L. R. 32 Calc. 775
s.c. 9 C. W. N. 807

——— ss. 417, 420—*Cheating—Definition—Pre-emption—Failure to disclose existence of mortgage subsequent to purchase.*—The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before suit, mortgaged the property, which was the subject of the suit for pre-emption. *Held*, that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of the offence of cheating. GENDAN LAL v. ABDUL AZIZ KHAN (1905).
I. L. R. 27 All. 382

——— s. 420.

See CHARGE, ADDITION TO OR ALTERATION OF . . . 9 C. W. N. 22

——— s. 420—*Addition to or alteration of subject-matter of indictment—Cheating—Property—Money—Criminal Procedure Code (Act V*

PENAL CODE (ACT XLV OF 1860)—*continued*

of 1898), ss 226 227—The Sessions Court is not a *Court of original jurisdiction*, and though vested with large powers for amending and adding to charges can *only do so with reference to the immediate subject* of the prosecution and committal and not with regard to *matter not covered by the indictment* The accused was put upon his trial before the Sessions Court on *charges under ss* 471 and ‡‡‡ of the Penal Code Upon motion to the High Court it was held that a *previous acquittal covered the charge* under s. 471, and that the accused could be tried only under s. ‡‡‡ *When the case came to trial the Sessions Judge* amended the charge to one under s. ‡‡‡ —*Held*, that *the Judge had full power under the law to amend* the charge, and that the High Court did not intend to *fetter his discretion* The word "*property*" in s 420 of the Penal Code includes money BIRENDRA LAL BHADURI v EMPEROR (1903)

I. L. R. 32 Calc 23

——— s. 434—*Boundary marks fixed by authority of public servant—Definition—Criminal Procedure Code, s 145*—A Magistrate making an order under s. 145 has no authority to cause the property, which is the subject of a dispute likely to occasion a breach of the peace to be demarcated by boundary pillars, and consequently, if he does so, a person destroying or removing such boundary pillars is not liable to conviction under s 434 of the Penal Code EMPEROR v RAMESHAR (1905)

I. L. R. 27 All. 300

——— s 441—*Criminal trespass—Definition—Occupation by zamindars of house left by deceased tenant*—A tenant of village *S*, who owned a house there, but was temporarily residing in a neighbouring village died and on his death the zamindars of *S* took possession of the house in *S*, adversely to the tenant's widow, alleging that they were entitled to it. *Held*, that the action of the zamindars could not be taken as amounting to criminal trespass within the meaning of s 441 of the Penal Code *Emperor v Jangi Singh I L R 26 All 194*, referred to. EMPEROR v BAZID (1905)

I. L. R. 27 All 298

——— ss. 465, 471—*Forgery and using as genuine a forged document*—In order to obtain admission to the Matriculation Examination of the Madras University as a private candidate, *V* was required to produce to the Registrar a certificate signed by the headmaster of a recognized high school that he was of good character and had attained his twentieth year *V* fabricated the headmaster's signature to such a certificate and forwarded it to the Registrar *Held* (SUBRAHMANIA AYYAR and DAVIES, *JJ* dissenting) that *V* was guilty of forgery *Per* SIR ARNOLD WHITE *C.J*—The offence of forgery is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s. 463 It was not necessary having regard to the wording of s. 24 that the accused should have intended to cause both wrongful gain to himself and wrongful loss to the University

PENAL CODE (ACT XLV OF 1860)—*continued*

Both intentions, however, were present in this case Moreover, the false document had been made with intent to support a "claim or title" within the meaning of those words as used in s 463. A claim to be admitted to a University examination is a claim within the meaning of s. 4 3 It was more clearly so in the present case as the accused had a "claim" to be exempted from the production of an attendance certificate, upon satisfying certain conditions precedent An intended deprivation of property is not an essential element of an intention to defraud. *Per* BENSON, *J*—Those decisions, which proceed on the ground that an act is not fraudulent, unless it causes or is intended to cause loss or injury to some one, would seem to take too narrow a view of the meaning of the word "*fraudulently*" as used in the Code. The act of the accused was fraudulent not merely by *reason of the advantage which he intended to secure* for himself by means of his deceit, but also by reason *of the injury, which must necessarily result to* the University, and through it to the public, from such *acts, if unrepressed*. *Per* SUBRAHMANIA AYYAR—The document was not made fraudulently within the *meaning of ss. 464 and 463 of the Code. Deprivation of property, actual or intended, does not constitute an essential element in regard to offences* falling under ss. 465 and 471 of the Penal Code; but the deception must involve some loss or risk of loss to an individual or to the public It is *not enough to show that the deception was intended* to secure an advantage to the deceiver *Per* DAVIES, *J*—It had not been shown that the accused in making the document had either the intention necessary to constitute it a false document within the meaning of s 464 A mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another A person to be defrauded must suffer some harm or damage or injury and there was no evidence that the Registrar, as representing the University, had suffered in any of these respects The University had been deprived of nothing and, on the other hand, had profited by the application by the accused. Moreover the intention of the accused was to subject himself to examination, which could not be deemed a thing of value. *If he failed*, it ended in nothing If he passed, he became entitled to a certificate not in consequence of the false writing, but on his own merits. KOTAMRAJU VENKATRAYADU v EMPEROR (1905) . . . I. L. R. 28 Mad. 90

——— s. 466—*Registration—Divorce—Mahomedan Marriage—Evidence*—Where one *X* by personating *P* before the Mahomedan Registrar of Marriages, obtained the registration of *P's* divorce from his wife, and the appellant identified *X* as *P* before the Registrar *Held*, that the appellant was not guilty of an offence under s 199 of the Penal Code inasmuch as the Registrar was not bound or authorized by law to receive his *statement in evidence*, but whether he was guilty of an offence under s. ‡‡ of the Penal Code would depend chiefly on whether he knew that *X* was not *P* or had no knowledge whether he was *P* or not. *Held*, that the Judge

PENAL CODE (ACT XLV OF 1860)—*concluded.*

had fairly put the evidence on this point to the jury. YASIN SHEIKH (AKONDA) *v.* EMPEROR (1905). 9 C. W. N. 69

——— ss. 482, 486.

See TRADE MARK. 9 C. W. N. 43, 969

——— s. 499, Exc. 9, ill. (*a*).

See DEFAMATION . 9 C. W. N. 195

——— s. 500.

See DEFAMATION. I. L. R. 32 Calc. 756

——— s. 500—*Defamatory statement in the course of a deposition, when privileged—Evidence Act (I of 1872), s. 132.*—The accused, while deposing before a Magistrate, was asked by the cross-examining pleader "whether Kanu had asked pardon of Haidar Ali in a *punchayet*" and in the course of his answer he made the following statement, which was false, *viz.*, "Haidar Ali admitted in the *punchayet* that Kanu beat with a wooden shoe." *Held*, that the statement of the accused was defamatory under s. 500, Penal Code, and was not privileged under s. 132, Evidence Act, as it was a voluntary statement not relevant to the issue in the case in which he deposed and was not elicited by the pleader putting questions, and further, the accused was actuated by malicious motives against Haidar Ali. HAIDAR ALI *v.* ABRU MIA (1905) 9 C. W. N. 971 s.c. I. L. R. 32 Calc. 756

PENSIONS ACT (XXIII OF 1871).

——— s. 4—*"Relating to," construction of—Grant—Civil Courts—Jurisdiction.*—S. 4 of the Pensions Act (XXIII of 1871), construed strictly as it must be, is entirely silent as to suits to recover possession of land, the revenue of which has been remitted. The words "no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue," occurring in the section, cannot, without a manifest strain of words, cover a suit to recover the possession of land or to obtain a declaration of a right to hold land. The phrase "relating to," as occurring in an enactment restrictive of the right to sue, must be construed strictly, *i.e.*, in favour of the right to proceed. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905) . . . . I. L. R. 29 Bom. 480

PERJURY.

See CRIMINAL PROCEDURE CODE, ss. 133, 342, 488 . . 9 C. W. N. 983

PLAINT.

——— in suit by Corporation.

CIVIL PROCEDURE CODE, s. 435. 9 C. W. N. 608

PLAINT—*concluded.*

——— rejection of—Court-fee.

See CIVIL PROCEDURE CODE, s. 54. 9 C. W. N. 844

——— *Amendment of plaint—Specific Relief Act (I of 1877), s. 42—Suit for declaration—Consequential relief—Construction of documents—Bombay Revenue Jurisdiction Act (X of 1876), s. 4.*—The plaintiffs filed a suit against the Secretary of State for India in Council for a declaration that they were entitled to hold certain lands free from assessment. The defendant objected that the suit was barred under s. 42 of the Specific Relief Act (I of 1877). After the settlement of the issues in the case, the plaintiffs applied for leave to amend the plaint by adding thereto a prayer for injunction by way of consequential relief. The lower Court refused to grant the prayer. *Held*, that the lower Court should have exercised its discretion in plaintiffs' favour, although the prayer for amendment was made very late, as it was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit. KALABHAI *v.* SECRETARY OF STATE FOR INDIA (1905). I. L. R. 29 Bom. 19

PLEADINGS.

See LANDLORD AND TENANT. 9 C. W. N. 460

——— Issues.

See BENGAL TENANCY ACT, s. 29. 9 C. W. N. 265

See CONTRACT ACT (IX OF 1872), s. 24. I. L. R. 27 All. 37, 174, 266

See GRANT . . 9 C. W. N. 1009

See PRACTICE . I. L. R. 32 Calc. 146

——— *Usufructuary mortgage—Purchase of equity of redemption—Suit by purchaser for redemption—Plea of right to pre-empt sale to plaintiff.*—The plaintiffs sued as purchasers of part of the equity of redemption of a usufructuary mortgage to redeem the mortgage and recover possession of a proportionate part of the mortgaged property. One of the mortgagees defendants pleaded that he had a right of pre-emption in respect of the sale, which formed the basis of the plaintiffs' title and was ready and willing to exercise such right. *Held*, that this plea could not be admitted as an answer to the plaintiffs' suit for redemption. *Ajudhia Bakhsh Singh* v. *Arb Ali Khan, I. L. R. 7 All. 892*, and *Ram Chand* v. *Durga Prasad, I. L. R. 26 All. 61*, referred to. IDARAT KHAN *v.* ILAHI BAKHSH (1905) . . . I. L. R. 27 All. 78.

POLICE.

See CIRCUMSTANTIAL EVIDENCE.

See CRIMINAL PROCEDURE CODE, ss. 160, 202, 203.

POLICE ACT (V OF 1861).

——— s. 4 (2)—*Criminal Procedure Code, s 195—Sanction to prosecute—Sanction to prosecute given by the District Magistrate as head of the police—Revision—Held* that the High Court has no power to interfere in revision where a District Magistrate has granted sanction for a prosecution under s 195 of the Criminal Procedure Code acting therein as head of the police of the district *Ramasory Lall v Queen Empress, I L R 27 Calc 452*, dissented from. EMPEROR v SHIB SINGH (1905) I. L. R. 27 All. 292

POLICY OF INSURANCE.

See MARINE INSURANCE.

POSSESSION.

See BENAMI TRANSACTION.

See CRIMINAL PROCEDURE CODE.

See JURISDICTION I. L. R. 32 Calc. 602

See JURISDICTION OF MAGISTRATE I. L. R. 32 Calc. 257

See LANDLORD AND TENANT I. L. R. 32 Calc 41, 51, 856

See MAHOMEDAN LAW I. L. R. 29 Bom. 267, 428

See OPIUM ACT . 9 C W. N 719

See PARTNERSHIP PROPERTY I L. R. 32 Calc 249

See REGISTRATION I. L. R 29 Bom. 42

——— *Title—Nature of merely possessory title.*—A person whose title to immoveable property rests upon mere possession is competent to deal with such property as if he were the owner, and his acts will be good as against all persons other than the true owner If such a possessor executes a registered deed of gift of the property, he is subject to the rule that no one can derogate from his own grant. *Govind Prasad v Mohan Lal, I L R 24 All 157*, followed. *Phul Chand v Lakkhu, I L R 25 All 338* referred to PARLWAN SINGH v RAM PHAROSE (1905) . . I. L. R 27 All. 189

POST OFFICE ACT (VI OF 1898).

——— ss. 20, 61

See OBSCENE POST CARDS I. L. R. 32 Calc. 247

——— s. 13.

See SMALL CAUSE COURT, MOFUSSIL. I. L. R. 28 Mad. 213

POSTHUMOUS SON.

See BENAMI . . 9 C. W. N. 89

See HINDU LAW I. L. R 29 Bom. 51

See LIMITATION . 9 C. W. N. 111

See RIGHT OF SUIT 9 C. W. N. 477

POTTAH.

See LANDLORD AND TENANT.

POWER OF ATTORNEY.

See EVIDENCE ACT.

PRACTICE.

See ADMISSIBILITY OF EVIDENCE. 9 C W. N. 111

See CIVIL PROCEDURE CODE, ss. 371, 596. 9 C. W. N. 369, 370

See EXECUTION I. L. R. 29 Bom. 79

See GROUND OF APPEAL 9 C. W. N. 636

See INSOLVENCY . 9 C. W. N. 221

See JURISDICTION I. L R. 32 Calc. 796

See PRIVY COUNCIL PRACTICE. 9 C. W. N. 74

See RECEIVER, NEW TRIAL, REMAND I. L. R. 32 Calc. 270, 339, 1069

See TRUST . I. L. R. 32 Calc. 143

——— *Suit to ascertain area of land to which plaintiff is entitled—Confusion of boundaries—Court no power to fix boundaries—No equity shown by plaintiff*—Where the plaintiff sued for recovery from the defendants of possession by severance and demarcation of a certain area of land out of the area described in the plaint, allowing the defendants to retain possession of as much land thereout as they could possibly retain consistently with it, the Judge in appeal dismissed the suit on the ground that the plaintiff had no cause of action against the defendants. The plaintiff preferred a second appeal When the assistance of the Court is sought for the purpose of ascertaining the boundaries, which the plaintiff himself is unable to point out by reason of some confusion in them, and to recover possession, when those boundaries have been ascertained by the Court: *Held*, following *Wake v Conyers (1759), 1 W and T L. C 170 at p 172*, that "the Court has no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties as some particular circumstance of fraud or confusion" KAVASJI v HORMASJI (1905) I. L. R. 29 Bom. 73

——— *Appeal—Criminal Procedure Code (Act V of 1898), s 421—Judgment of Appellate Court, contents of*—It is very desirable that an Appellate Court, without going to the length of writing

PRACTICE—*continued.*

an elaborate judgment, should, in deciding a criminal appeal, notice briefly, but clearly, the objections urged on appeal and how they were disposed of. EKCOWRI MUKERJEE *v.* EMPEROR (1905).

I. L. R. 32 Calc. 178

———*Petition—Affidavit, necessity of—High Court Rules 1, 3 and 4—Ch. XII—Civil Procedure Code (Act XIV of 1882), ss. 17, 20, 57 and 522—Cause of action—Plaint, return of—Jurisdiction, illegal exercise of.*—When a petition to the High Court states facts, which are matters of record and which are supported by copies of the order passed by the Court below, such a petition need not be supported by an affidavit. *A* brought a suit for dower in the Court of the Subordinate Judge of Saran alleging that the marriage as well as the divorce took place in that district. The defendant objecting to the suit on the ground that he worked and resided at Calcutta, the Subordinate Judge returned the plaint to be presented in the Presidency Small Cause Court. The District Judge, on appeal, declined to interfere with the order of the first Court. *Held*, that s. 17, cl. (*a*), of the Civil Procedure Code, applied to the case; and the order returning the plaint was bad in law, the cause of action having arisen in the district of Saran. *Held*, further, that, inasmuch as the Subordinate Judge had failed to exercise a jurisdiction vested in him by law by refusing to accept the plaint, and that the District Judge erred in law in confirming the decision of the first Court, the High Court had authority to interfere, under s. 622 of the Civil Procedure Code. ZAMIRAN *v.* FATEH ALI (1905) . . I. L. R. 32 Calc. 146

———*Civil administration suit—Further directions—Advocate General—By consent, added as party—Right to question validity of legacies—Estoppel—Laches—Stale demand—Will—Khoja Mahomedan will—Gift to a class—Construction.*—*M*, a Khoja Mahomedan, died in 1864. By his will and codicil he left his property to trustees upon trust, *inter alia*, to pay his daughter, *L*, a monthly sum during her life, and, after her death, to pay it to her children. *M's* residuary estate was charged in favour of certain charitable objects. In 1868 the Advocate General commenced a suit (962 of 1868) for the administration of *M's* estate. In 1869 *L* died, leaving four children surviving her. In 1871 a decree for the administration of *M's* estate was granted to *R*, the husband of *L*, in another suit (370 of 1870). In 1873 a decree for administration was passed in the Advocate General's suit (962 of 1868). By the decree the Advocate General was given liberty to join in taking the accounts and making the enquiries directed in suit 370 of 1870. In 1899 the Commissioner made his final report in suit 370 of 1870, to which, however, exceptions were filed. In 1902 the case came before TYABJI, *J.*, for further directions. Up to this date the validity of the gift to *L's* children had not been questioned by the parties and the Commissioner's report was based on the assumption that it was valid. The Advocate General was now by consent of the parties joined as a co-defendant, to simplify and regularize the suit. He thereupon contended that the gift to *L's* children was bad as transgressing the rule laid down in the Tagore case and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The Division Court ruled that the Advocate General was not entitled at this stage to raise the point. *Held* (reversing TYABJI, *J.*) that the Advocate General was not precluded, even at this stage, from questioning the validity of the gift to *L's* children. Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit wherein they are adopted. A beneficiary is generally taken as sufficiently represented by his trustees; but this does not hold good where the contest lies between the beneficiaries themselves. *Held*, on further hearing, on the construction of the will, that such of *L's* children as were in existence at the death of the testator were entitled to an annuity at *L's* death. ADVOCATE GENERAL *v.* KARMALI (1905).

I. L. R. 29 Bom. 133

PRACTICE—*concluded.*

PRE-EMPTION.

See COURT FEES ACT.

See LANDLORD AND TENANT.

9 C. W. N. 871

See MAHOMEDAN LAW.

I. L. R. 32 Calc. 932, 988
9 C. W. N. 826

See OUDH LAWS ACT . 9 C. W. N. 129

———*Pre-emption—Customary law of Hindus in Behar—Claim by a non-resident—Validity—Sham sale—Right of suit.*—Although there may be a custom of pre-emption amongst the Hindus of Behar, it cannot be availed of by persons, who are neither natives of, nor domiciled in, the district, in which the property is situate. A native of Balia in the North-Western Provinces cannot claim the right of pre-emption in respect of properties situate in the district of Chapra. Where the sale is not a *bonâ-fide* one, but a sham transaction, no right of pre-emption arises. PARSASTH NATH TEWARI *v.* DHANAI OJHA AND DEWAKINUNDAN MISSER (1905) . . . 9 C. W. N. 874

———*Concurrent suits for pre-emption brought by co sharers having equal rights—Form of decree.*—Where, pending a suit brought by one co-sharer for pre-emption, another co-sharer having equal rights with the first filed a similar suit for pre-emption of the same sale, it was *held* that the second plaintiff was entitled to a decree for pre-emption in respect of one-half of the property sold. *Jai Ram v. Mahabir Rai, I. L. R. 7 All. 720*, followed. *Man Khan v. Mamur Khan, Weekly Notes, 1886, p. 56*, distinguished. SALIG RAM *v.* KALI SHANKAR (1905) . . . I. L. R. 27 All. 485

———*Wajib-ul-arz—Construction of document.*—Where a wajib-ul-arz gave a right of pre-emption on transfer of a share, first, to a co-sharer,

PRE-EMPTION—*continued*

who was a collateral relative then to a co sharer in the patt, and then to a co-sharer in the Mahal 'for the price offered by a stranger' it was *held*, that no right of pre-emption accrued to a co sharer of a superior class, when the sale was to a co sharer of an inferior class; but the right only came into existence when the sale was to a stranger *Sheo Balak Singh* v *Lachmidhar*, *I L R 23 All 427*, referred to *Sukhdeo Singh* v *Bahadur Singh*, *Weekly Notes 1903 p 104*, distinguished KHATUN BIBI v SAYIDA BIBI (1903) I L R 27 All. 457

——— *Prescription—Landlord and tenant—Permanent tenancy, acquisition of by farmer—Decree for khas possession against tenant, who set up permanent title—Continuance of tenant in possession—Presumption that tenant continued to hold as permanent tenant—Limitation—Commencement—Sub soil, landlord's right to*—In a suit for khas possession against *B*, who set up a permanent tenancy it was decided that *B* held some of the lands as *joidar* and the rest as *varadar* under the plaintiff and a decree was made in plaintiff's favour for *khas* possession of such lands only as *B* held as *varadar* But although symbolical possession of the lands decreed was delivered to the plaintiff, *B* continued to hold possession of all the lands in suit for more than 12 years. On several occasions during this period *B* made assertions of title as permanent tenant to the knowledge of the plaintiff's agents *Held* that *B* acquired by prescription a right to hold the lands as a permanent tenant but that the sub soil in respect of which no prescriptive right had been made out by *B* remained with the landlord It was to be presumed that after symbolical possession was delivered to the plaintiff *B* continued to hold the lands as on the title which he had already asserted in the suit and limitation ran from that date and not from the date or dates on which *B* subsequently made assertions of permanent title to the knowledge of plaintiff's agents. A farmer may acquire by prescription the right of a permanent tenant by setting up such higher right adversely to the zamindar *Juggobundhu* v *Ram Chunder I L R 5 Calc 584 Gopal* v *Krishna Pao I L R 25 Bom 275 Seshamma Shettati* v *Chickaya Hegade*, *I L R 20 Mad 107* and *Maharaja Rajendur Kishwar Singh Bahadur* v *Shea Persun Misser 10 M I A 438*, referred to BAGDU MAJHI v DURGA PROSAD SINGH (1905) 9 C W N. 292

——— *Mahomedan law—Talab-i-ishtishhad—Reference to the previous talab-i-mawasibat necessary.*—When in asserting a claim for pre-emption under the Mahomedan law the making of the *talab-i-ishtishhad* is required it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same *Abid Husain* v *Bashir Ahmad I L R 20 All 499*, and *Rajab Ali Chowdhry* v *Chandi Churn Bhadra*, *I L R 17 Calc 843*, followed. *Chotu* v *Husain Bakhsh*, *Weekly Notes, 1893, p 101*, referred to *Sahibzadi* v *Alakdiya Weekly Notes 1902, p 137*, and *Nundo Persad Thakur* v *Gopal Thakur*, *I L R 10 Calc 1003* dissented from MUBARAK HUSAIN v KAMIZ BANOO (1905) . I. L. R. 27 All. 160

——— *Refusal to purchase—Insolvency—Civil Procedure Code ss 351 and 352—Private sale by Collector in pursuance of orders of Civil Court exercising jurisdiction in insolvency*—In order to debar a party entitled to pre empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into Where in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction certain revenue paying property of the insolvent was sold by the Collector, but by private contract and not at public auction, it was *held* that such a sale did not oust the pre-emptive rights of such persons as were otherwise entitled to claim pre emption *Raj Nath* v *Sital Singh*, *I L R 13 All 224* referred to. KANHAI LAL v. KALKA PRASAD (1905) I L R 27 All. 670

PRESCRIPTION

See LANDLORD AND TENANT

PRESIDENCY MAGISTRATE

See CRIMINAL PROCEDURE CODE

See SANCTION FOR PROSECUTION
I L. R. 33 Calc. 469

PRESIDENCY TOWNS SMALL CAUSE COURTS ACT (XV OF 1882)

See SMALL CAUSE COURT PRESIDENCY TOWNS

PRESUMPTION.

See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF I. L. R. 33 Calc 1107

See RECORD OF RIGHTS.
I L. R. 32 Calc. 336

PRINCIPAL AND AGENT.

See CIVIL PROCEDURE CODE.

——— *Suit for account—Limitation Act (XV of 1877), Arts 89 and 120, Sch II*—A suit by a principal against his agent for an account and also for recovery of money from him that may be found due, is a suit for moveable property received by the agent on behalf of the principal and not accounted for, and is governed by Art. 89, Sch. II of the Limitation Act (XV of 1877) *Joyendra Nath Roy* v *Deb Nath Chatterjee*, 8 C W N 113, followed. SHIB CHANDRA ROY v CHANDRA NARAIN MUKERJEE (1905) . . I L. R. 32 Calc. 719

PRINCIPAL AND AGENT—*continued.*

——— *Liability of principal—Right of suit—Agent's right to sue principal for price of goods purchased.*—Where the plaintiffs, as agent of the defendants, purchased goods for the defendants from wholesale dealers, and it was not their case as set out in the plaint that they had done so by pledging their own personal credit or that the pledging of their own credit was within the scope of the agency: *Held*, that they would have no cause of action against the defendants for the amount due to the wholesale dealers, until they were compelled to pay their demands. KHURKUN SAHA v. DHATIA DAS (1905). I. L. R. 32 Calc. 1145

——— *Sale and purchase by the agent on his own account—Wagering contracts—Usage of trade—Commission agents—Pakki adat system—Tender of evidence as to delivery at other vaidas—Relevancy of such evidence.*—The defendant, a resident of the North-West Provinces, from time to time sent orders to the plaintiffs in Bombay to sell and purchase cotton on his account. The plaintiffs carried out the defendant's orders as they were received. Up to the due date they had purchased on behalf of the defendant 400 bales more than they had sold. It appeared that by reason of other contracts entered into with the merchants from whom they had purchased on behalf of the defendant the plaintiffs had 'cancelled' all these purchases, before the due date. The defendant neither sent money to pay for the cotton nor did he direct the plaintiffs to sell on his behalf. The plaintiffs sued the defendant describing themselves as commission agents for their commission and for the loss on 400 bales sold on defendant's account. The plaintiffs were unable to show that they had paid any damages on account of the defendant, for failure to take delivery, to any of the merchants from whom they had purchased on defendant's account. The suit was dismissed in the lower Court on the ground that the contracts were wagering contracts. In appeal the plaintiffs contended that they were entitled as between themselves and the defendant to treat themselves as the principals, on the ground that the business was conducted on the *pakki adat* system, under which no privity was established between the defendant and the merchants to whom or from whom cotton was sold or bought on his account. *Held* that, if the plaintiffs were, as their plaint stated, commission agents, and they were employed by the defendant as his commission agents, and as such, under instructions and on account of the defendant, entered into these purchases, they had no cause of action. *Held*, further, that the usage termed the *pakki adat* system involved a material departure from the ordinary relations between a principal and his agent of which there was no suggestion in the pleadings or issues, nor was there any evidence to prove it. The plaintiffs must therefore be held to the case they had made. During the course of the hearing in the lower Court it appeared that at the *vaida*, for which contracts in question had been made, the plaintiffs had neither given nor taken delivery of any cotton. They tendered evidence to show that at other *vaidas* they had given or taken delivery of cotton and other goods. The learned Judge rejected the evidence as irrelevant to the issue whether the contracts were wagering contracts. *Held*, on appeal, that the evidence tendered was relevant and should have been admitted. CHANDULAL SUKLAL v. SIDHRUTHRAI (1905) . . . . I. L. R. 29 Bom. 291

PRINCIPAL AND AGENT—*concluded.*

PRIVATE INTERNATIONAL LAW.

——— *French citizens in British India—Onus—Domicile, proof of—Post-nuptial marriage settlement—Immoveable property, law governing—Lex rei sitæ—Matrimonial domicile—Code Napoleon, Arts. 1401—1496.*—One Alexandre Charriol married a French woman in British India *sans contract*. Subsequently he executed a marriage settlement dealing with certain immoveable property in Calcutta settling the same on certain trusts. The property was sold later on and the sale-proceeds were invested in certain funds. In this suit by the present trustees for directions for the disposition of the trust funds, the question was whether the deed was invalid and inoperative and therefore whether French and not English law should govern the disposal. *Held*, that the onus was first on the person attacking the settlement to show conclusively that the settlor was a French citizen with a French domicile. *Held*, also on the facts of this case, that the settlor was not a French citizen with a French domicile. *Held*, further, that even if the settlor were of French domicile, his having married a French woman *sans contract* did not imply such a *special* contract as would take away the operation of the ordinary rule that *lex rei sitæ* would govern immoveable property. *D'Nicols* v. *Curlier, 2 Ch. 410*, dissented from. *D'Nicols* v. *Curlier, 1900, A. C. 21*, explained. *Story's Conflict of Laws, s. 159*, referred to. A. L. BONNAUD *v.* L. J. A. E. CHARRIOL . . . . 9 C. W. N. 394

PRIVY COUNCIL.

See APPEAL TO PRIVY COUNCIL.

See CIVIL PROCEDURE CODE, S. 596. 9 C. W. N. 370

See LETTERS PATENT, S. 39. 9 C. W. N. 566

PROBATE.

See COURT FEES ACT.

See EVIDENCE.

See WILL . . 9 C. W. N. 49, 769 I. L. R. 29 Bom. 530

PROBATE AND ADMINISTRATION ACT (V OF 1881).

See WILL . . 9 C. W. N. 1021

——— S. 3.

See PROBATE . I. L. R. 32 Calc. 1082

——— S. 3—*Of what documents granted—Document appointing successor to sebaitship—Will*

PROBATE AND ADMINISTRATION ACT (V OF 1881)—*continued*

—Where the mohant of an *akhra* executed a document described as a will, but purporting merely to appoint the *petitioner* as the next *sebait* or manager for the purpose of carrying out the *seba pujas*, and other rites and ceremonies appertaining to the *akhra*, with full power to manage and supervise the properties belonging to the *akhra* *Held*, that the document was not a will and could not be admitted to probate. CHAITANYA GOBINDA PUJARI ADHIKARI v DAYAL GOBINDA ADHIKARI (1905) I. L. R 32 Calc 1082 s.c 9 C W. N. 1021

——— ss. 4, 12, 59, 88, 90

See MAHOMEDAN LAW 9 C W. N 938

——— s 50

See WILL, PROOF OF 9 C W N 49

——— s. 50—*Just cause—Revocation of probate—Omission to file inventory—Special citation—Onus—Procedure.*—To successfully maintain an application for revocation of probate under s 50 of the Probate and Administration Act on the ground of the omission of an executor or administrator to file an inventory or account, it must be proved to the satisfaction of the Judge that the omission was wilful or without reasonable cause. Mere omission to serve a special citation would not by itself be a sufficient ground for revoking the grant, if it is shewn that the person, on whom the citation ought to have been served, had knowledge of the application for probate. The onus of proving that he had such knowledge rests on the party, who alleges it, and it is not necessary for the party, who applies for the revocation of the grant, to prove not only that no special citation was served on him, but also that he had no knowledge of the proceedings. When a Judge is satisfied that a summary grant made without service of special citation ought not to have been made, he ought not to order revocation directly, but should call upon the applicant for the grant to prove in solemn form PREM CHAND DAS v SURENDRA NATH SAHA (1905) 9 C. W. N 190

——— s 78—*Administration bond entered into by surety—Allegations by surety against administratrix of waste and mismanagement—Suit by surety against administratrix seeking to be discharged from liability regarding future acts of administratrix—Maintainability—Contract Act (IX of 1872), s 130—Revocation of continuing guaranties—Application to a contract of suretyship under administration bond*—First defendant was administratrix of her husband's estate Plaintiff became one of her sureties under s 78 of the Probate and Administration Act. Plaintiff brought this suit alleging that first defendant as administratrix was wasting and mismanaging the estate. He asked that he might be discharged from his recognisance as a surety as regards future transactions on the part of the administratrix; that in the alternative the administratrix might be directed to complete her administration of the estate, and that his surety bond might then be vacated *Held*, that the plaintiff was not entitled to the relief asked for *Held also*, that s. 130 of the Indian Contract Act does not apply to the special contract of suretyship, which is entered into by a surety to an administration bond. *Raj Narain Mookerjee v Ful Kumari Debi, I L R 29 Calc. 68*, not followed *Bai Somi v Chokshi Ishvardas Mangaldas, I L R 19 Bom 215*, followed and approved. SUBBAYA CHETTY v RAGAMMAL (1905) I. L. R. 28 Mad. 191

PROBATE AND ADMINISTRATION ACT (V OF 1881)—*concluded*

PROBATE DUTY.

See COURT FEES ACT I. L. R. 29 Bom. 161

PROCEDURE.

See AGRA TENANCY ACT

See DECREE

PROCESS

See CRIMINAL PROCEDURE CODE

See WITNESSES

PROMISSORY NOTE.

See BOND

PROPERTY.

See CRIMINAL PROCEDURE CODE, ss 517, 520

PROSECUTION

See CRIMINAL PROCEDURE CODE.

See SANCTION FOR PROSECUTION

PROVIDENT FUNDS ACT (IX OF 1897, AS AMENDED BY ACT IV OF 1903)

——— ss 2 (4), 4.

——— *Compulsory deposit—Provident Fund—Contributions by a servant—Liability of the contributions to be attached on the servant's leaving the Railway Company's service—Attachment—Civil Procedure Code (Act XIV of 1882), s 278*—The contribution, which the employé of a Railway Company makes towards the Railway Provident Fund, governed by the provisions of the Provident Funds Act (IX of 1897), is a "compulsory deposit" within the meaning of s. 4 of the Provident Funds Act (IX of 1897, as amended by Act IV of 1903) The deposit does not cease to be compulsory, when the employé leaves the service of the Company, since it was not, when made, repayable on demand, and was, therefore, at that time a "compulsory

PROVIDENT FUNDS ACT (IX OF 1897, AS AMENDED BY ACT IV OF 1903) —*concluded.*

deposit"; and having once acquired that character with the attendant consequences it continued to retain it. A "compulsory deposit" of the above description does not become liable to be attached under s. 268 of the Civil Procedure Code (Act XIV of 1882), on the subscriber's leaving the Company's service. The expression "compulsory deposit," as used in the Provident Funds Act (IX of 1897, as amended by Act IV of 1903), is not merely descriptive of the sum deposited, but is a term of art, which by virtue of legislative provision includes that which is not within its natural meaning; for, under s. 2, cl. 4 of the Act, it includes "any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the rules of the fund." VEERCHAND *v.* B. B. & C. I. RAILWAY COMPANY (1905) . . . I. L. R. 29 Bom. 259

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887).

See SMALL CAUSE COURTS, MOFUSSIL.

PROXY.

———— *Company—Articles of Association—Meeting of shareholders to alter Memorandum of Association—Validity of votes given by proxy—Act XII of 1895.*—By a power-of-attorney dated 14th October 1881, some of the shareholders in the appellant Company appointed and authorized certain specified persons, "and all persons who at any time during the continuance of these powers of attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted . . . and in the absence from Bombay" of all the said persons "then the person or persons for the time being holding the procuration of the said firm and managing the said business" to vote as proxy for them at meetings of the Company. Art. 65 of the Articles of Association of the Company provided that "no person shall be appointed or have authority to act as a proxy, who is not a shareholder in the Company." At meetings in May and June, 1902, the right of proxy was exercised by a person, who had become a shareholder in the Company in March, 1889, and was manager of the firm of Wallace & Co., and holding its procuration from 1st April, 1889, but who was neither a member of the firm nor a shareholder in the Company, when the power-of-attorney was executed. *Held*, by the Judicial Committee (reversing the decision of the High Court) that on the true construction of Art. 65 the proxy was not necessarily required to be a shareholder, when the power of attorney was signed: the article was complied with by his being so qualified at the time when he was called upon to act as a proxy. *Held* also that, although the proxy was not expressly named in the power of attorney, he was sufficiently described in it for all business purposes, and the articles of association required nothing more. BOMBAY-BURMA TRADING CORPORATION *v.* DORABJI (1905).

I. L. R. 29 Bom. 126
L. R. 32 I. A. 39

PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895, I OF 1897).

———— *Certificate-sale—Suit to partially set aside sale—Maintainability.*—The owner of a portion of property sold in execution of a certificate under the Public Demands Recovery Act cannot sue to have the sale set aside as to his portion only. His remedy is either to pay for setting aside the sale of the whole property or to allow the sale to stand and pray that his co-sharers, who were the purchasers at the sale, should reconvey his share to him. *Bhooban Chandra Sen* v. *Ram Soondar Surmah, I. L. R. 3 Calc. 300,* referred to. BIDESHAR JHA *v.* SRIKISHEN JHA (1905).

9 C. W. N. 805

———— ss. 3, 19, cl. (2) and 20—*Suit to set aside a sale on the ground of fraud, whether maintainable—Civil Procedure Code (Act XIV of 1882), ss. 244, 312 and 424—Secretary of State, notice upon.*—A suit to set aside a sale under the Public Demands Recovery Act, on the ground of fraud on the part of the auction-purchaser, is maintainable; and neither s. 244 nor s. 312 of the Civil Procedure Code is a bar to such a suit. *Umed Ali* v. *Rajlaksmi Debya, 1 C. L. J. 538,* and *Barhamdeo Narayan Singh* v. *Bibi Rasul Bandi, I. L. R. 32 Calc. 691 : 1 C. L. J. 360,* distinguished. In such a suit, where no relief is claimed by the plaintiff on the ground of fraud against the Secretary of State for India, it is not necessary to serve a notice under s. 424 of the Civil Procedure Code upon him, as it would be impossible to serve a notice fulfilling the requirements of that section. *Sahebzadee Shahunshah Begum* v. *Fergusson, I. L. R. 7 Calc. 499; Muhammad Saddiq Ahmad* v. *Panna Lal, I. L. R. 26 All. 220,* referred to. RAGHUBANS SAHAI *v.* PHOOL KUMARI AND SECRETARY OF STATE FOR INDIA IN COUNCIL (1905).

I. L. R. 32 Calc. 1130

———— ss. 7, 10, 16, 19, 31.

See CERTIFICATE.

I. L. R. 32 Calc. 691

PUBLIC NUISANCE.

———— *Obstruction of ford by erection of bund—Prescriptive right of public to user of ford—Desuetude of right to erect bund—Use of one's right so as not to cause obstruction or nuisance—Criminal Procedure Code (Act V of 1898), s. 133.*—Where the petitioner erected a *bund* in a river, the effect of which was to render it unfordable at a place where the stream had been fordable throughout the year, except for a few days during the freshets, and claimed the right to do so, but it was proved that for a period exceeding 20 years the public had used the ford, and had never been so obstructed in crossing the river on foot or on vehicles. *Held*, that the public had acquired a prescriptive right-of-way through the river and that the petitioner had lost his right of erecting a *bund* by long desuetude; that even if the petitioner had a subsisting right to dam the river by a *bund*, such right was subject to the maxim *sic utere tuo ut alienum non laedas*; that his action

PUBLIC NUISANCE—*concluded*

had caused an obstruction, which was not justifiable to the public, who were in the lawful enjoyment of a right-of way, and that the order of the Magistrate to remove the obstruction was not illegal. ZAFFER NAWAB *v* EMPEROR (1905) I. L. R. 32 Calc. 930

PUBLIC PLACE.

See GAMBLING . I. L. R. 29 Bom. 386

PUBLIC POLICY.

See VENDOR AND PURCHASER.

PUBLIC SERVANT.

See PENAL CODE, ss 170, 180, 434

——— *Clerk to a Sub Registrar—Illegal gratification—Penal Code (Act XLV of 1860), ss. 21, 161—Registration Act (III of 1877), ss. 6 to 14, 69, 84*—A clerk appointed by a Sub-Registrar, and paid out of an allowance given to the Sub-Registrar is not a "public servant" within the meaning of s. 21 of the Penal Code *Bhagwati Sahai v* Emperor (1905). I. L. R. 32 Calc. 664

PUBLIC TRUST.

——— s 539.

See RIGHT OF SUIT.

——— s. 539—*Public trust—Sanction of the Advocate General, when necessary, under the Civil Procedure Code*—S. 539 of the Civil Procedure Code contemplates the existence of a dispute of such a *public nature* that the intervention of the Advocate-General is necessary to decide if and by whom a suit should be brought to establish a public right. *Safedur Raja v Gour Mohun Das, I L R. 24 Calc 418, 425, referred to.* MOSI JAN BIBEE *v* KHADEM HOSSEIN (1905) . . 9 C. W N. 151

——— s. 539—*Suit by an individual to establish a common right to a public religious trust—Other persons associated as co-plaintiff—If such suit falls within s 30 or s 539—Ss 539 and 30, if mutually exclusive—S 539, construction of*—The words of s. 539 of the Civil Procedure Code contemplate the existence of persons, other than those permitted to sue, who may be affected The existence of such other persons, or the joinder of some of them as co-plaintiffs does not take away the right of an individual to sue under that section, provided his rights, as contemplated in that section, have been infringed. The Chinese community of Calcutta are divided into two classes, the Puntis and the Hakalus. The Puntis being excluded from the Chinese temple and cemetery, five of them, after obtaining the sanction of the Advocate-General under s. 539 of the Civil Procedure Code, instituted this suit for a declaration that the temple cemetery were public religious and charitable trusts for the benefit of the said community and as such, the Puntis including the plaintiffs, were entitled to the benefits thereof Objection was taken that the suit, as framed, was not maintainable as it fell within

PUBLIC TRUST—*concluded*

s 30 of the Civil Procedure Code and not under s. 539,—*Held*, that the suit was maintainable. MACMOCHI *v* LEE CHIN (1905) . 9 C W. N. 594

PUTNI.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s 244.

I L R. 32 Calc. 103

See LIMITATION . 9 C W. N. 673

See LIMITATION ACT, s. 7

9 C. W. N. 785

——— *Non joinder of parties—Misjoinder of causes of action—Res judicata—Putnis, successive grant of—Rights of putnidars inter se—Tenure intermediate between the zamindar and putnidar, if can be created*—*R* and *H* were each the proprietress of an 8-annas share in each of the mehals Nos. 5582 and 194, the lands of which were undivided. Plaintiff was the *putnidar* of *R*'s half share in mehal No. 5582 and was the purchaser of its other half, which belonged to *R* The co-plaintiffs were the purchasers of the 8 annas share of the other mehal No 194, which belonged to *H* The other 8 annas share of this estate was purchased by *I* and *P*. The defendants held *putnis* in respect of certain specified lands within the mehals by virtue of two leases granted by *R* and *H* The defendants' *putnis* were prior in date to the plaintiff's *putni* of the entire 8 annas share in mehal No 5582. The plaintiff had formerly brought a suit in the Munsif's Court for arrears of rent against the defendants, which was dismissed on the ground that the plaintiff being a *putnidar* had no right of suit for rent against a fellow *putnidar* The present suit was brought by the plaintiff in the Court of the Subordinate Judge against the defendants for arrears of rent. The co-plaintiffs were added because *H* was in the habit of collecting the rents due in respect of both estates jointly from the defendants, but *I* and *P* were not joint. *Held*, that there was no defect for non-joinder of parties: first because the law does not require that the owner of two different estates should sue for their rents jointly, if the rent due to each is known, and secondly because as a matter of fact *I* and *P* were found to have been collecting their rents separately from the defendants. That though the plaintiff's demand was based upon two separate leases, the plaintiff was not bound to bring two separate suits, since the plaintiff was entitled to collect the entire rent due from the defendants in one estate He might sue for the entire rent in one suit, the two shares in the estate being undivided and the two leases alike. *Held further*, that the decision of the Munsif in the former suit was not *res judicata* in the present suit, because the latter suit would not have been cognizable by the Munsif's Court, which tried the former suit. *Gopi Nath Chowbey v Bhagwat Pershad, I L. R 10 Calc. 697; Raghu Nath Panjah v. Isur Chunder Chowdhry, I. L. R 11 Calc 153; Kailash Chandra De v Tarak Nath Mandal, I L. R 25 Calc. 571, note*; and *Bhugwanbutty Chowdhrain v Forbes, I L. R 29 Calc. 78*, distinguished. That the grant

PUTNI—*concluded.*

of a *putni* lease to the plaintiff could not operate in derogation of the defendants' previously acquired rights as *putnidars*. Nevertheless the zamindar had the power to grant away a portion of his remaining rights and to create a tenure intermediate between himself and the defendants by granting the *putni* lease to the plaintiff. Therefore the plaintiff was entitled to demand the rent, which the defendants were bound to pay to their superior landlord. RAJKUMAR MAJUMDAR v. PRABAD CHANDRA GANGULY (1905) . . . . . 9 C. W. N. 656

PUTNI SALE LAW REGULATION VIII OF 1819.

See LIMITATION ACT.

PUTNI TALUK.

See CONTRACT ACT.

R

RAILWAYS ACT (IX of 1890).

———— s. 101—*Endangering safety of persons—Death by rash or negligent act—Contributory negligence—Penal Code (Act XLV of 1860), s. 304A.*—The Bengal-Nagpur Railway is worked on the "line clear and caution message" without a system, no train being allowed to leave a station "line clear" certificate in a prescribed form to the effect that the line is clear up to the next station. The petitioner, the assistant station master of Gomharria Station, who was on duty and busy issuing tickets to passengers, wrote out in the prescribed form book the following conditional line clear message, although he had received no message from Sini Station: "on arrival of 15 down passenger at Gomharria, line will be cleared for No. 80 up goods train from Gomharria to Sini. All the particulars required by the rule were not filled in, no number was entered on it, nor was the time of arrival of the train filled in. The form-book was left in the station-master's room. The guard of No. 80 up goods train, which was waiting at Gomharria, entered the station-master's room in his absence, took the imperfect certificate out of the book, and without reading it appended his signature, passed it on to the driver and gave the signal for the train to start, all without the knowledge of the petitioner. The result was a collision between the 15 down passenger train and the 80 up goods train, causing the death of several persons. The petitioner was convicted under s. 304A of the Penal Code and s. 101 of the Indian Railways Act of 1890 and sentenced to rigorous imprisonment: —*Held*, that the act of the petitioner did not in itself endanger the safety of other persons, and that the effect was too remote to be attributable to such a cause. *Sint Dass v. The Empress, Ind. Ry. Cas. 722*, followed. SHANKAR BALKRISHNA v. EMPEROR (1905) . . . . . I. L. R. 32 Calc. 73

RAIYAT.

See BENGAL TENANCY ACT.

RAIYATWARI TENURE.

See LIMITATION ACT.

———— *Grant of bed of tidal and navigable river on raiyatwari tenure—Power of Government to determine such tenure—Limitation Act (XV of 1877), Sch. II, Art. 149—Decree in the alternative, legality of.*—Land forming the bed of a tidal and navigable river is the absolute property of Government. Where Government has for a long time been collecting revenue and special cesses from the occupant thereof, it will be presumed that such land was granted on raiyatwari tenure and the occupier will be entitled to hold the land so long as he pays the revenue; and he can be ousted only under the provisions of Madras Act II of 1864. Where the assignees from the Secretary of State join him as co plaintiff with themselves in a suit, the period of limitation will not be 60 years under Art. 149, Sch. II of the Limitation Act; such article applying only to suits brought on behalf of the Secretary of State. The only parties entitled to a decree in such a suit will be the assignees and a decree in the alternative cannot be passed in favour of the Secretary of State *or* the assignees, when the right of the assignees is admitted. PULLANAPPALIY SANKARAN NAMBUDRI v. VITTIL THALAKAT MOHAMED (1905). I. L. R. 28 Mad. 505

RATEABLE DISTRIBUTION.

———— *Civil Procedure Code (Act XIV of 1882), s. 295—Assets—First decree against three judgment-debtors—Subsequent decree against only one of them.*—S. 295 of the Civil Procedure Code (Act XIV of 1882) governs where the first decree is against three judgment-debtors and the decree, on which the petitioner relies, is against one of those three. *Nimbaji v. Vadia Venkati, I. L. R. 16 Bom. 683*, not followed. CHHOTALAL v. NANBHAI (1905) . . . I. L. R. 29 Bom. 528

RECEIVER.

See CIVIL PROCEDURE CODE, SS. 351, 355 357, 503.

———— *Receiver, appointment of—Pending suit for recovery of property.*—Where in a suit pending before a first Subordinate Judge for recovery of property, an application has been made for the appointment of a Receiver and granted. *Held*, on appeal that it is inadvisable to go into the merits of a case, which is pending before a Court, where the appointment of a Receiver is under consideration. Such a course is undesirable and tends to prejudge the case. RAM SUNDER DASS v. KAMAL JHA, *alias* KAMAL DAS (1905) . . I. L. R. 32 Calc. 741

———— *Receiver—Appointment of new Receiver in place of original Receiver—Civil proceedings instituted by original Receiver and pending at date of appointment of new Receiver—Necessity for making new Receiver a party.*—When a Receiver appointed under s. 503 of the Code of Civil Procedure institutes civil proceedings and is then replaced by another Receiver, it is necessary that the new Receiver should be made a party to those

RECEIVER—*concluded*

proceedings Observations on the mode and circumstances in which a new Receiver will be made a party AKULA JANARDESI v DURELLI JAGANNADHA ROW (1905) . I. L. R. 28 Mad 157

——— *Suit against Receiver without leave of Court—Application for such leave after filing of suit—Practice*—The consent of the Court to an act on against a Receiver appointed by the Court is a condition precedent to the right of the party to sue, and cannot be rectified by a subsequent application for permission to continue the action brought without such permission PRAMATHA NATH GANGOOLY v KHETRA NATH BANERJEE (1905)
I. L. R. 32 Calc 270
s c 9 C W N 247

RECORD OF RIGHTS

See BENGAL TENANCY ACT s 103
9 C. W. N. 504

———*Bengal Tenancy Act (VIII of 1885), ss 107, 109—Undisputed entry—Presumption of accuracy how rebutted*—The presumption under s 109 of the Bengal Tenancy Act (VIII of 1885) in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate S 109 of the Bengal Tenancy Act lays down a rule of evidence, it does not override the rules of *res judicata*, which are of general application. GHANESHYAM MISSER v PADMANAND SINGH (1905)
I. L. R. 32 Calc 338
s c 9 C W N 610

——— *Bengal Tenancy Act (VIII of 1885), ss 101 to 106—Settlement Officer, jurisdiction of*—The particulars specified in s 102 of the Bengal Tenancy Act, when recorded and compiled under s 103, amount to a "Record-of-rights as contemplated in Chapter X of the Act and proceedings taken by a Revenue Officer, after making a record of the particulars under s. 103, including those under s 165 of the Act, are not therefore void for want of jurisdiction *Dharani Kanta Lahiri v Gaber Ali Khan I L R 30 Calc 339*, relied upon *Per* PARGITER, J—The difference between s 103 of the old Act and the present section is, that under the former, the Revenue Officer was to record the particulars specified in s 102; but under the present Act s 103 gives an applicant the right to select what particulars he may wish to have recorded. If the applicant asks that all or almost all particulars mentioned in s 102 be recorded that would constitute a "Record of rights; but if only the particulars mentioned in cls. (a) and (e) of s 102 be recorded, they not involving any rights the record could hardly be called a 'Record of rights" SUDHENDU KUMAR ACHARJYA CHOWDHRY v GOBINDA NATH SIRCAR (1905) . I. L. R. 32 Calc 518
s c 9 C W. N. 504

RECOVERY OF RENTS ACT (X OF 1859).

See BENGAL TENANCY ACT, s 21
9 C W N 141

REDEMPTION

See EXECUTION OF DECREE
See MORTGAGE SALE
9 C W. N 201, 225, 789

REGISTRAR.

——— *Registration—Divorce—Mahomedan marriage—Evidence*—Where one *X*, by personating *P* before the Mahomedan Registrar of Marriages obtained the registration of *P*'s divorce from his wife and the appellant identified *X* as *P* before the Registrar *Held*, that the appellant was not guilty of an offence under s 199 of the Penal Code, inasmuch as the Registrar was not bound or authorized by law to receive his statement in evidence; but whether he was guilty of an offence under s 419 of the Penal Code would depend chiefly on whether he knew that *X* was not *P* or had no knowledge whether he was *P* or not. *Held*, that the Judge had fairly put the evidence on this point to the jury YASIN SHEIKH (ABONDA) v EMPEROR (1905) . . 9 C. W. N 89

REGISTRATION

See MORTGAGE . I. L. R. 29 Bom. 199
See REGISTRATION ACT
I. L. R. 27 All 307, 305, 392, 564

REGISTRATION ACT (III OF 1877).

———ss 3 and 17—*Transfer of Property Act (IV of 1882), s 107—Immoveable property—Definition—Lease of right to receive market dues*—*Held*, that the right to collect market dues upon a given piece of land is a benefit to arise out of land within the purview of s. 3 of the Registration Act, 1877 A lease therefore, of such right for a period of more than one year must be made by registered instrument SIKANDAR v BAHADUR (1905)
I. L. R. 27 All. 462

——— ss 6 to 14, 69, 84.

See PUBLIC SERVANT
I. L. R. 32 Calc. 664

——— s 17—*Mortgage—Release of part of mortgaged property on part payment of mortgage debt effected by endorsement on bond—Registration*—A portion of certain property, the subject of a mortgage, was purchased by a stranger to the bond, who paid off a portion of the mortgage debt, and on the bond the fact of payment together with the release of a specified portion of the mortgaged property was endorsed. *Held*, that such an endorsement did not require registration *Gurdial Mal v. Jaukee Mal, I L. R 7 All 820*, followed. GANGA BAKHSH v JAGANNATH (1905)
I. L. R. 27 All. 305

——— s. 17—*Transfer of Property Act (IV of 1882), s 54—Registration—Assignment of arrears of profits—Lambardar and co-sharer*—A deed of assignment of profits already

REGISTRATION ACT (III OF 1877)—*continued.*

due by a lambardar to a co-sharer does not require to be registered, either by virtue of s. 17 of the Registration Act, 1877, or by virtue of s. 54 of the Transfer of Property Act, 1882. DAMODAR DAS v. GIRDHARI LAL (1905) . I. L. R. 27 All. 584

——— ss. 17 (b) and 47—*Date of execution of deed—Date of registration—Priority—Mortgage deed—Construction—Execution of the deed on plain paper—Subsequent registration—Complete transaction—Unpaid consideration money.*—On the 24th May 1900, the defendant No. 1 mortgaged certain lands to plaintiff for R1,300, of which R775 were in respect of past debts and R525 were to be advanced in cash. This latter sum the defendant No. 1 did not attempt to receive. The deed was written on a plain paper bearing one anna receipt stamp, and it was attested by two witnesses. The deed itself contained a recital that the mortgagor (defendant No. 1) was, within 15 days from its date, to execute a mortgage on a stamped paper and get it registered. This he failed to do. The plaintiff thereupon presented the original deed for registration on the 30th July 1900, and it was duly registered at a subsequent date on the payment of stamp duty and penalty. In the meantime, on the 4th June 1900, the defendant No. 1 sold five survey numbers from out of the above lands to the defendant No. 2; this sale-deed was registered on the 4th July 1900. On this latter date the defendant No. 1 mortgaged 4 more survey numbers out of the same property to defendant No. 3; and the deed was registered on the same day. The plaintiff then brought this suit to recover his money by sale of the property mortgaged to him. *Held*, that it was clear from the terms of the plaintiff's deed that legally the mortgage therein contained began to operate from the date of the document, that is, in other words, it was not a document, which merely created a right to demand another document, but created as between the parties a charge in the nature of a mortgage. *Purmanandas Jiwandas* v. *Dhursey Virji, I. L. R. 10 Bom. 101*, followed. *Held* further, that the non-payment of R525 by the plaintiff could not affect the nature of the document itself or vary its terms: the defendant No. 1 could sue to recover the unpaid remainder or for damages. *Held*, also, that the plaintiff's document, though registered later than the deeds of defendants Nos. 2 and 3, was, by virtue of its prior execution, entitled to priority over them under s. 47 of the Registration Act (III of 1877). MOTICHAND v. SAGUN (1905).
I. L. R. 29 Bom. 46

——— s. 47—*Date of operation—Date of execution of the deed.*—On the 11th August 1898, the defendant No. 1 passed to the plaintiff a *mulgeni* lease, which was registered on the 10th December 1898. In the meanwhile the defendant No. 1 passed another *mulgeni* lease to the defendant No. 2 in respect of the same property on the 17th November 1898, and got it registered on the 18th November 1898. On the 5th December 1898, the defendant No. 1 mortgaged the same property to the defendant No. 2; this deed of mortgage was registered on the 9th December 1898. Defendant No. 2 obtained possession of the property. The plaintiff then sued to establish his *mulgeni* lease and to recover possession of the lands. *Held*, that the plaintiff was entitled to recover possession of the lands; for though his deed was registered after the defendant No. 2's deeds, yet the moment it was registered it had operation from the date of its execution by virtue of s. 47 of the Registration Act (III of 1877). *Held*, further, that it was immaterial whether the defendant No. 2's deeds were or were not accompanied by possession. *Kali Das Mullick* v. *Kanhya Lal Pandit, L. R. 11 I. A 218*, and *Bai Suraj* v. *Dalpatram Dayashankar, I. L. R. 6 Bom. 380*, followed and applied. NARAYAN v. LAXUMAN (1905) . . . I. L. R. 29 Bom. 42

——— s. 50—*Registration—Document.*—In a competition between a document, which is compulsorily registrable and registered and one which is optionally registrable and unregistered, the former will prevail, whether the unregistered document be of the same nature as the registered document or not. *Shib Chandra Chakravarti* v *Johobux, I. L. R. 7 Calc. 570*, relied upon. SRISH CHANDRA ROY v. MUNGRI BEWA (1905) . . 9 C. W. N. 14

REGULATION—1793—XI.

See HINDU LAW I. L. R. 32 Calc. 6

——— 1800—X.

See HINDU LAW . I. L. R. 32 Calc. 6

——— 1803—II.

See LIMITATION . I. L. R. 32 Calc. 669

——— 1805—II.

See LIMITATION . . 9 C. W. N. 676

——— 1805—XII.

See HINDU LAW . I. L. R. 32 Calc. 6
9 C. W. N. 676

——— 1882—VII, s. 9.

See HINDU LAW I. L. R. 32 Calc. 6

——— 1825—XI.

——— s. 4 - cl. (2)—*Act XVIII of 1876—Alluvion and diluvion—Ownership, change of—Reformation—Principles.*—A river, which separated two estates situated respectively on its north and south banks, shifted its course to the north laying bare to its south certain lands which originally belonged to the estate on the north bank, but so as still to leave a channel between this land and the estate on the south bank. *Held*, that this was not a case of slow and gradual accretion by the inch or foot or yard. The original ownership of the reformed land therefore remained unaffected. *Lopez* v. *Muddun Mohun Thakur, 13 Moo. I. A. 467*, and *The Mayor of Carlisle* v. *Graham, L. R. 4 Ex. 361*, referred to. THAKURAIN RITRAJ KOER v. THAKURAIN SARFARAZ KOER (1905).
9 C. W. N. 889
s.c. L. R. 32 I. A. 165

REMAND.

See CIVIL PROCEDURE CODE.

——— *Appeal—Sessions Judge, power of—Jurisdiction—Practice*—A Sessions Judge, while disposing of a criminal appeal, has no authority under the Code of Criminal Procedure to remand the case when the judgment of the Court below is unsatisfactory, directing it to write out a proper judgment after rehearing the parties, if they so desire. It is the duty of the Sessions Judge in such a case to go fully into the whole facts and dispose of the appeal He cannot devolve this duty on the Court below TARA CHAND SINGH *v* EMPEROR (1905) . . I. L. R. 32 Calc. 1069

——— *Remand—Preliminary point—Suit decided with reference to some only of several issues framed—Held*, that it is competent to an appellate Court to remand a case under s 562 of the Code of Civil Procedure where the Court of first instance, having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided. *Sheoambar Singh v Lallu Singh, I L R 9 All 30, foot note*, and *Ramchandra Joishi v Kazi Hassim, I L R 16 Mad 207*, followed. MATA DIN *v* JAMNA DAS (1905) . . I. L. R 27 All. 691

——— *Limit to remand—Custom opposed to Statutes, validity of—Rent Recovery Act (VIII of 1865), s 11—Cultivation by wells constructed at tenants' cost, liability to enhanced rent for—Payment of enhanced rent for a number of years, whether an implied contract to pay—Agreement and contract, difference between—Tenant with right of occupancy, right of, to construct wells without permission of landholder*—Ryots with permanent rights of occupancy in a zemindari constructed wells at their own cost without obtaining the permission of the zemindar and cultivated dry lands with garden crops for periods ranging from 1 to 18 years Suits were brought by the ryots before the Sub Collector under s 8 of the Rent Recovery Act to compel the defendant, the zemindar, to grant them proper pattas for fasli 1312, alleging that the pattas tendered were illegal as they charged the higher garden rate for dry lands cultivated by them with the aid of wells constructed at their own cost The defendant pleaded that he was entitled to the enhanced rate (1) by custom, (2) by virtue of a contract to be implied from previous payments No consideration for such a contract was however alleged The Sub-Collector framed two issues—one as to the existence of the custom set up by the defendant, and another as to whether the previous payments by the plaintiffs operated as an estoppel or evidenced an implied contract to continue to pay the enhanced rates. The Sub-Collector did not record evidence as to custom, holding that such custom even if proved could not deprive the plaintiffs of the benefits expressly given by the Act. He also held that any such implied contract as that set up by the defendant would be illegal as opposed to the provisions of the Act. He passed a decree, that the defendant should grant pattas as claimed by the plaintiffs On appeal the District Judge held that the payment of rent at the enhanced rate raised a presumption that there was a contract to pay such rent; and that, if there was no contract express or implied the rent must be fixed in accordance with the other provisions of s 11 of the Rent Recovery Act. He reversed the decrees of the Sub-Collector and remanded the cases for retrial under s 562 of the Code of Civil Procedure On appeal to the High Court—*Held, per* SUBRAHMANI AYYAR, J, that the order remanding the case was not legal as all the questions raised between the parties and on which they went to trial, had been decided, and the questions so raised were purely questions of law A custom can be upheld only so far as it is not in conflict with statute law, and a custom to pay enhanced rent for improvements effected by a tenant at his cost is illegal as opposed to the provisions of the Rent Recovery Act. *Fischer v. Ramakshi Pillai, I L R 21 Mad 136*, followed. *Gopalasami Chettiar v Fischer, I L R 28 Mad 328*, referred to It makes no difference whether a tenant constructed wells at his cost prior to or after the passing of Act VIII of 1865 In either case no additional rent can be claimed *Nagasami Kamia Nack v Jyodi Rama Goundan, 6 Mad R R 5.* Payment for a number of years of enhanced rent may be evidence of an agreement to pay at that rate, but it will not be binding as a contract, unless supported by consideration *Quære*, whether when the enhanced rate had been paid for a large number of years and when the lapse of time is such as to make it unfair to call on the landlord to prove consideration, a lawful origin may not be presumed. *Gann v Free Fisheries of Whitstable, 11 H. L. C 192 at p 103*, referred to No such presumption can be made when the payments have been only for a period extending from one to eighteen years. Tenants with permanent rights of occupancy are entitled to construct wells without the permission of the landholder; and a custom requiring such permission may be bad, as unreasonable, and is certainly illegal as opposed to the policy of s 11 of the Rent Recovery Act *Venkatanarasimha Naidu v Dandamudi Kotayya, I L. R 30 Mad 299*, referred to *Held, per* MOORE, J, that the Sub-Collector having disposed of the case on two preliminary issues, the District Judge was right in remanding the cases under s 562 of the Code of Civil Procedure. ARUMUGAM CHETTI *v* JAGAVEERA PANA VENKATESWARA ETTAPPA (1905) I. L. R. 28 Mad. 444

——— *Whether consent of parties can validate an illegal remand under s 564 of Civil Procedure Code—Waiver, effect of—Effect of illegal remand by lower Appellate Court on points properly decided*—Where the Court of first instance had framed all the necessary issues and decided all those issues, and the lower Appellate Court, reversing the decision of the Court of first instance on one of the issues, remanded the case for retrial under s. 564 of the Code of Civil Procedure, *Held*,

REMAND—*concluded.*

on second appeal. *Per* SUBRAHMANIA AYYAR, *J.*—An order of demand, contrary to the provisions of s. 564, is not merely irregular, but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail. It can be objected to by a party, if he has not given his consent to such a course, and even a party, who has not consented, may be equitably estopped by subsequent conduct from treating such an order as null and void. Such an order of remand does not necessarily vitiate the decision of the lower Appellate Court on questions properly decided by it, which can be attacked only on grounds legally open to the parties on second appeal. It cannot be treated as void for want of jurisdiction, so as to be incapable of being validated by consent or waiver. *Mohesh Chandra Dass* v. *Jamiruddin Mollah, I. L. R. 28 Calc. 324*, referred to. *Malikarjuna* v. *Pathaneni, I. L. R. 19 Mad. 479*, referred to. *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61 at p. 97*, followed. *Per* MOORE, *J.*—The order of remand was illegal and no consent of parties could make it valid. MANAGER OF THE COURT OF WARDS, KALAHASTIE STATE *v.* RAMASAMI REDDI (1905) . I. L. R. 28 Mad. 437

REMARRIAGE.

See HINDU LAW.

RENT.

See BENGAL TENANCY ACT, s. 182.
9 C. W. N. 416

See BENGAL TENANCY ACT, s. 188.
9 C. W. N. 34

See DECREE, LANDLORD AND TENANT.
I. L. R. 32 Calc. 463, 972

See LANDLORD AND TENANT
9 C. W. N. 96

See TRANSFER OF PROPERTY ACT, s. 73.
9 C. W. N. 11

RES JUDICATA.

See ADMINISTRATOR.

See BENGAL TENANCY ACT, s. 109.
9 C. W. N. 610

See CIVIL PROCEDURE CODE.

See CIVIL PROCEDURE CODE, s. 13.
I. L. R. 27 All. 37, 59, 142, 148, 163

See ESTOPPEL BY JUDGMENT—MESNE PROFITS . I. L. R. 32 Calc. 118, 357

See EXECUTION PROCEEDINGS.
I. L. R. 28 Mad. 26, 338

See GOVERNOR IN COUNCIL.
9 C. W. N. 257

——— *Matters in issue—Issue of law erroneously decided—Causes of action.*—In a previous suit for rent against a permanent tenure-holder in a permanently-settled area: *Held*, following a ruling

RES JUDICATA—*continued.*

of the High Court, that the plaintiff could recover interest on the arrears only at the rate of 12 per cent. per annum, as s. 67 of the Bengal Tenancy Act controlled s. 179 of the Act and was a bar to his recovering at the higher rate mentioned in the *kabuliat*. The ruling referred to was subsequently overruled by a Full Bench. In a subsequent suit between the same parties on the same *kabuliat* for rent for a subsequent period: *Held*, that the case must be decided upon the law as it stood when judgment was pronounced and that the plaintiff could recover the larger sum for interest; the decision in the previous suit would not be *res judicata*. The subsequent suit having been brought on a fresh cause of action, no question as to the construction of the *kabuliat* had arisen, and the law since the decision of the former suit had been determined by judicial decision to be otherwise than what it was formerly regarded to be. A point of law may constitute *res judicata*. *Parthasaradi Ayyangar* v. *Chinna Krisna Ayyangar, I. L. R. 5 Mad. 304; Chamanlal* v. *Bapubhai, I. L. R. 22 Bom. 669; Venku* v. *Mahalinga, I. L. R. 11 Mad. 393; Rai Churn Ghose* v. *Kumud Mohon Dutt Chaudhuri, 1 C. W. N. 687*; and *Bishnu Pria Chowdhurani* v. *Bhaba Sundari Debya, I. L. R. 28 Calc. 318*, referred to. *Gouri Koer* v. *Audh Koer, I. L. R. 10 Calc. 1037*, and *Phundo* v. *Jangi Nath, I. L. R. 15 All. 327*, distinguished. ALIMUNNISSA CHOWDHURANI *v.* SHAMA CHARAN ROY (1905) . . . . I. L. R. 32 Calc. 749

——— *Findings necessary to support decree—Limitation Act (XV of 1877), s. 14—'Unable to entertain suit'—'Other causes of a like nature'—Dismissal of previous suit for non-joinder—Sch. II, Arts. 142 and 144 of Act XV of 1877—Possession under decree subsequently reserved—Act XV of 1877, Sch. II, Art. 29.*—An appellate judgment operates by way of estoppel as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings. A plaintiff is not entitled under s. 14 of the Limitation Act to exclude the time spent in prosecuting a previous suit when such suit was dismissed for non-joinder on findings arrived at after trial and not without trial, because the Court was unable to entertain the suit. Under Art. 142, Sch. II of the Limitation Act limitation runs from the date of dispossession, and no fresh starting point is given because the party dispossessed subsequently obtains possession under the decree and is ousted from possession, when the decree is reversed. *Sayad Nasrudin* v. *Venkatesh Prabhu, I. L. R. 5 Bom. 382*, followed. *Degumbury Dossee* v. *Rajah Anundnath Roy, W. R. (1864), 43; Firingee Sahoo* v. *Sham Manjhee, 8 W. R. Civil Rule 373*, and *Dagdu* v. *Kalu, I. L. R. 23 Bom. 733*, referred to. Sch. II, Art. 9, does not apply when the suit is substantially for possession of property, though the plaintiff avers that an instrument relied on by the defendant is a forgery. *Sundaram* v *Sithammal, I. L. R. 16 Mad. 311*, and *Abdul Rohim* v. *Kirparam Daji, I. L. R. 16 Bom. 186*, followed. NARAYANAN CHETTY *v.* KENANAMMAI ACHI (1905) . I. L. R. 28 Mad 338

RES JUDICATA—*concluded*

——— *Civil Procedure Code, s 13—Res judicata—Erroneous decision in a former suit—Bengal Tenancy Act (VIII of 1885), ss 67, 74, 179—Mulurari lease—Abwab—Illegal cesses—Stipulation to pay*.—Where the plaintiff in a suit for recovery of rent claimed certain cesses, which the defendant had stipulated to pay in his *kabuliat* and which the defendant said he was not liable to pay, inasmuch as in a previous suit for recovery of rent of a previous period, it had been held that the same was not recoverable according to law: *Held*, that the present claim was barred by the rule of *res judicata* PADMANAND SINGH v RADHA SINGH (1905) . 8 C W N 469

———*Court of Agent of Governor—Appeal to Governor in Council—Dismissal of suit on ground of political expediency—Legality—Res judicata—Jurisdiction, want of—Consent of parties—Act XXIV of 1839, ss 2, 3, 4—Rules XXI and XXII*.—A suit instituted in the Court of the Agent to the Governor at Vizagapatam was upon application to the defendant and without opposition from the plaintiff, transferred by the High Court to the District Court The District Court dismissed it on the ground that no sufficient evidence had been given to establish the plaintiff's case Subsequently the High Court decided that it had no jurisdiction to order such a transfer and the consent of parties could not confer jurisdiction. The plaintiff thereafter instituted a fresh suit in the Agent's Court on the same cause of action The Agent dismissed the suit as *res judicata* and an appeal to the Governor in Council was rejected on the ground that it would be inexpedient and set a bad example and encourage a multitude of suits for the same cause of action *Held*, by the *Judicial Committee* that the legal right to bring a suit and to have it determined by the proper Court created for the purpose of determining such suits cannot be barred upon considerations of policy or expediency *Also*, that the former decision of a Court adjudged by the High Court to be without *jurisdiction* cannot be treated as *res judicata*, and the plaintiff was entitled to have his suit tried on the merits by the Agent's Court SRI VIKRAMA DEO MAHARAJULUGARU MAHARAJA OF JEYPORE v GUNAPURAM DEVABANDHU PATNAIK (1905) L L R 28 Mad. 42
s c 9 C. W N. 257

RESTRAINT OF TRADE

See COMPANY

——— *Agreement—Contract Act (IX of 1872), ss 23 and 27—Continuous cause of action—Damages—Transfer of business to a limited Company—Effect*—In March 1902, certain Ice Manufacturing Companies in Bombay entered into an agreement relating to the manufacture and sale by them of ice. The agreement fixed, *inter alia*, the minimum price at which ice was to be sold by the parties the proportion of the manufacture which each was to bear, and the proportion of the profits which each was to receive It further created a monthly obligation to pay into, and a corresponding right to receive from, a general common fund the difference, if any, between the profits actually received by the parties and those to which they were, under the agreement, entitled On a suit being instituted for breach of the agreement, in which damages, sustained prior to and pending the hearing of the suit, were claimed: *Held*, the fact that an agreement, if carried out, would limit competition and keep up prices did not necessarily bring it within the terms of s 27 of the Contract Act (IX of 1872): to succeed in the defence under that section it was necessary to establish that the agreement was one, whereby a person was restrained from exercising a lawful profession, trade, or business of any kind. FRASER AND COMPANY v BOMBAY ICE MANUFACTURING COMPANY (1905)
I. L. R. 29 Bom 107

RESUMPTION

See CHAUKIDARI CHAKRAN LAND

REVENUE JURISDICTION ACT (BOMBAY ACT X OF 1876)

——— *s. 4, proviso—Grant—Civil Court—Jurisdiction—Pensions Act (XXIII of 1871), s 4*—The proviso to s 4 of the Bombay Revenue Jurisdiction Act (X of 1876) contains no exception in respect of holdings unaccompanied by proprietary right in the soil, and there is no saving clause, which would suggest that such a claim to such holdings might fall within the purview of the Pensions Act. The right of an alienee of the revenue to sue for disturbance of his possession by a stranger or by Government is clearly recognised by the proviso above cited, and the only condition required is that the claim should be under an enactment, instrument, sanad, written grant or judgment such as is described in the proviso BALVANT RAMCHANDRA v SECRETARY OF STATE (1904)
I. L. R 29 Bom 480

REVENUE OFFICER

See BENGAL TENANCY ACT

REVENUE SALE

——— *Revenue sent by money-order—Estate, wrong description of—Mistake—Revenue in arrear—Revenue Sale Law (Act XI of 1859), ss 8, 20 33—Land Revenue rules in the Land, Revenue and Cesses in Bengal rule 29—Jurisdiction*—Where the actual amount of revenue remitted by money order reached the Collectorate in time, but the remitter made a mistake in the tauzi number and the name of the registered proprietor, but was right as to the name of the estate and the amount of revenue payable in respect thereof *Held*, that it was the duty of the officers of the Collectorate to rectify the mistake under rule 29 of the Land Revenue Rules, and not to put up the property to sale which, if held, would be without jurisdiction and ought to be set aside. *Bal Krishna*

REVENUE SALE—*concluded.*

Das v. *Simpson, I. L. R. 26 Calc. 833 : L. R. 25 I. A. 151,* referred to. HAMID HOSSEIN v. MUKHDUM REZA (1905) . . I. L. R. 32 Calc. 229
9 C. W. N. 300

REVENUE SALE LAW (ACT XI OF 1859).

See SALE FOR ARREARS OF REVENUE.

REVERSIONER.

See HINDU LAW I. L. R. 32 Calc. 473
9 C. W. N. 25, 636

REVIEW.

See CIVIL PROCEDURE CODE.

See CRIMINAL PROCEDURE CODE.

———*Review of judgment—Appeal from order granting a review—Grounds of appeal.*—When an application for review of judgment has been granted for "any other sufficient reason," the sufficiency or otherwise of the reason for granting it is not a ground of appeal within the meaning of s. 629 of the Code of Civil Procedure. *Per* RICHARD, *J.*—But the fact that the Court-fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment. ALI AKBAR v. KHURSHED ALI (1905).
I. L. R. 27 All. 695

———*Powers of review of High Court in criminal cases—Finality of order of High Court—Order not sealed—Criminal Procedure Code, ss. 107 and 110—Security for keeping the peace—Security for good behaviour.*—An application from jail—worded as an appeal—against an order passed under ss. 110 and 118 of the Code of Criminal Procedure was summarily rejected by means of the following order:—"No appeal lies in this case, and no sufficient ground appears for interference in revision. The application is dismissed." This order was signed by the Judge, who passed it, but was not sealed with the seal of the Court. *Held,* that the Judge, who had passed the order quoted above, was not under the circumstances precluded from entertaining an application for revision presented by counsel in relation to the same matter. *Queen-Empress* v. *Lalit Tiwari, I. L. R. 21 All. 177,* followed. *Held* also, that where it appears from the evidence that there is an apprehension of any one using violence towards a particular person or particular persons, he ought to be bound over to keep the peace as provided by s. 107, and not be proceeded against under s. 110 of the Code of Criminal Procedure. EMPEROR v. KALLU (1905).
I. L. R. 27 All. 192

REVISION.

See ACT V OF 1861, S. 4 (2).
I. L. R. 27 All. 192, 292, 296, 359, 380, 397, 439, 531

See APPEAL.

REVISION—*concluded.*

See CIVIL PROCEDURE CODE, S. 206.
9 C. W. N. 695

See CRIMINAL PROCEDURE CODE.

See LIMITATION . 9 C. W. N. 956

REVIVAL OF SUIT.

See CIVIL PROCEDURE CODE, S. 371.

RIGHT OF SUIT.

See BENGAL TENANCY ACT, S. 188.
9 C. W. N. 34

See HINDU LAW—ALIENATION.
9 C. W. N. 25

See INSOLVENCY . . 9 C. W. N. 952

See MAINTENANCE I. L. R. 32 Calc. 479

See PARTITION . . 9 C. W. N. 699

See SLANDER . . 9 C. W. N. 847

———*Right of suit—Trespasser in possession—Purchaser from rightful owner, suit by—Sale-deed voidable and not void—Effect—False recital as to consideration—Transfer by person out of possession—Validity—Champerty—Gambling in litigation—Adoption—Proof.*—It is not enough for a trespasser, who seeks to maintain possession against a purchaser from the rightful owner, to make out that the sale-deed in favour of the purchaser is voidable at the option of the vendor. He must show that it is absolutely void. A sale-deed cannot be challenged by a person, who was no party to it, when apart from an untrue recital as to consideration there was no other flaw in the transaction. The sale-deed in this case had been passed in favour of the plaintiff by the rightful owner, who was out of possession, needy and unable to prosecute his claim against the trespasser without assistance. The Judicial Committee held that there was nothing extortionate or unreasonable in the terms of the bargain in this case, no gambling in litigation, nothing contrary to public policy, and that the transaction was a present transfer by the owner to the plaintiff giving the latter a good title, on which he was competent to sue. ACHAL RAM v. KAZIM HUSAIN KHAN (1905).
9 C. W. N. 477
s.c. I. L. R. 27 All. 271
L. R. 32 I. A. 113

———*Bengal Tenancy Act (VIII of 1885) ss. 69, 70 (5)—Order of Collector, finality of.*—S. 70 (5) of the Bengal Tenancy Act does not bar a suit by a tenant against a third party for recovery of crops awarded to the latter by the Collector. *Jaga Singh* v. *Chooa Singh, I. L. R. 22 Calc. 490,* referred to. CHHEDI v. CHHEDAN (1905).
I. L. R. 32 Calc. 42

———*Mutwalis, rights of—Waqf property, claim to—Suits relating to public rights—Civil Procedure Code (Act XIV of 1882), s. 539.*—A suit between two private parties claiming certain rights as *mutwalis* over waqf property is not of such a public nature as to come within the purview of s. 539 of the Civil Procedure Code, which contemplates that there

RIGHT OF SUIT—*concluded*

must be some dispute in existence between the parties of such a public nature that the intervention of the Advocate-General is necessary to decide if and by whom a suit should be brought to establish a public right *Sajedur Raja Chowdhury v Gour Mohun Das Baishnav I L R 24 Calc 418*, referred to MANJAN BIBEE v KHADEM HOSSEIN (1905) I. L. R. 32 Calc 273

RIOTING

See CRIMINAL PROCEDURE CODE

RIPARIAN OWNER.

——— *Easements Act (V of 1882), s 7, illustration J—Stream—Usufruct—Right to use and consume water without material injury to other like owners*—With respect to riparian owners the law is that each such owner has a right to the usufruct of the stream, which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence *Embrey v Owen 6 Exch 353*, followed. S 7, illustration (*j*), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream provided that he does not thereby cause material injury to other like owners DINKAR v NARAYAN (1905) I. L. R. 29 Bom. 357

——— *Water rights for irrigation where stream flows through separate estates—Relative rights of upper and lower proprietors on the banks to the use of the water—Action to enforce rights—Absence of proof of damage*—A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may for legitimate purposes, withdraw so much of the water as will not materially lessen the downward flow on to his neighbour's land. In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that the plaintiff should prove that he has suffered any damage AIYAVU MOOPPAN v SAWMINATHA KAVUNDAN (1905) I. L. R. 28 Mad. 236

S

SALE.

See BENGAL TENANCY ACT, s. 153
9 C. W. N. 721

See CONTRIBUTION, SUIT FOR
I. L. R 32 Calc 643

See EVIDENCE I. L. R. 32 Calc. 710

See LANDLORD AND TENANT
9 C W. N. 972

SALE—*concluded*

See MAHOMEDAN LAW, MORTGAGE.
I. L. R. 32 Calc. 253, 891, 938

See PRE-EMPTION . 9 C. W. N. 474

See PUBLIC DEMANDS RECOVERY ACT
9 C. W. N. 805

See REVENUE SALE LAW
9 C. W. N. 487

See SALE I. L. R. 32 Calc 502, 509

——— setting aside of.

See CIVIL PROCEDURE CODE, s 244.
9 C. W. N. 134

See MORTGAGE . 9 C. W. N. 201, 989

SALE FOR ARREARS OF RENT.

See EVIDENCE.

——— *Rights and liabilities of purchaser—Protected interest—Incumbrance, annulment of—Notice to annul incumbrance—Bengal Tenancy Act (VIII of 1885), s 160 (g), s. 167.*—A clause in a putni lease to the effect that, if the putnidar should grant a darputni the darputnidar shall act according to the terms of the putni kabuliat does not amount to a permission to the putnidar to create a darputni within the meaning of s 160, cl (*g*) of the Bengal Tenancy Act Knowledge on the part of the proprietor of the creation of the darputni and acceptance by him of the putni rent from the darputnidar are not sufficient to constitute the darputni at protected interest within the meaning of that section Where an application under s. 167 of the Bengal Tenancy Act was made to the Collector and both the application and the notice issued bore the seal of the Collector and the notice was duly served *Held*, that the provisions of the section were complied with, although the application was received by a Deputy Collector in charge and the notice was signed by a Deputy Collector "for the Collector" It is not necessary that the Collector should personally receive the petition or personally cause the notice to be served. *Akhoy Kumar Soor v Bejoy Chand Mahatap, I. L. R. 29 Calc 813*, approved on this point MAHOMED KAZIM v NAFFAR CHUNDRA PAL CHOWDHRY (1905) I. L. R. 32 Calc. 911

——— *Setting aside sale—Irregularity—Bengal Regulation VIII of 1819, ss 8, 10—Publication of notice of sale—Form of notice—Order as to lots to be sold*—A sale under Regulation VIII of 1819 cannot stand, if the provisions of the Regulation are not strictly complied with. The sticking up of certified copies instead of the original petition and notice as required by s. 8 of the Regulation is a material irregularity A notice not containing any order as to the lots to be sold is not in proper form; where the notice was stuck up only until the 14th May and the sale actually took place on the 15th, *held* that this was in contravention of s. 10 of the Regulation. S 10 would seem to imply that the notice is to remain stuck up, until it should be taken

SALE FOR ARREARS OF RENT—*concluded.*

down at the time of the sale. When the notices and the petition were stuck up every day at 10 A.M. and taken down at 5 P M, and they were not stuck up at all on Sundays :—*Held*, that the procedure was not justified by the Regulation. BIJOY CHAND MAHATAP v. ATULYA CHARAN BOSE (1905) . . . . I. L. R. 32 Calc. 953

SALE FOR ARREARS OF REVENUE.

	Col.
1. INCUMBRANCES	317
2. FRAUDULENT SALE	318
3. SALE	318
4. SEPARATE SHARES	319

See MORTGAGE-LIEN.

I. L. R. 32 Calc. 283

1. INCUMBRANCES.

———— *Incumbrances—Act XI of 1859, s. 53—Proprietor—"Sale" or "purchaser," time of—Defaulting proprietors—Debt assigned to mortgagee—Want of diligence in recovering it—Accounts.*—The respondent on 17th February 1896, purchased an estate sold in execution of a decree of the Civil Court against the then proprietors. He obtained his sale certificate on 21st March and was put into possession on 29th April 1896. Default occurred on 12th January 1896 in payment of the Government revenue on the estate which on 25th March 1896 was sold under Act XI of 1859 for arrears of revenue and purchased by the respondent : *Held*, that at the time of his purchase at the revenue sale the respondent was a proprietor of the estate within the meaning of s. 53 of Act XI of 1859, and therefore took it subject to the incumbrances existing on it at the time of sale. Neither the fact that the sale by the Civil Court was subsequent in date to the default for arrears of revenue nor the further circumstance that under the revenue sale certificate the purchase related back beyond the actual date of the sale and took effect from the 13th January 1896, altered the ownership of the estate nor made the respondent any the less, a proprietor. Where "sale" or "purchase" is spoken of in Act XI of 1859 in connection with time, the time meant is that at which the sale actually takes place and not that to which its operation is carried back by relation. S. 53 of the Act is a proviso to, or qualification of, s. 37. There is no implied limitation in s. 53, which restricts its operation to defaulting proprietors. *Abdool Bari* v. *Ramdass Coondoo, I. L. R. 4 Calc. 607*, approved. Mortgagors assigned to their mortgagee a debt due to them from a third person, and in taking the account of what was due to the mortgagee, the Courts in India debited him with the amount of the debt, though he had not received it :—*Held*, that it lay upon the mortgagee to use reasonable diligence to recover it from the debtor, and it appearing that no serious attempt had been made to do so, it had been rightly debited in the account. SHYAM KUMARI v. RAMESWAR SINGH (1905) I. L. R. 32 Calc. 27

SALE FOR ARREARS OF REVENUE —*continued.*

2. FRAUDULENT SALE.

————*Separate shares, sale of—Act XI of 1859, ss. 5, 6, 13, 25, 32—Equitable relief—Fraud—Irregularity—Notice—Description of property—Appeal to Commissioner, specification of grounds in.*—No revenue sale can be set aside on the ground of fraud, when the sale would have taken place whether or not the fraud had been committed ; nor can the equitable relief of reconveyance to the party affected by the fraud be enforced against the auction-purchasers, when some of them are innocent and *bonâ fide* purchasers. *Amirunessa Khatoon* v. *The Secretary of State for India, I. L. R. 10 Calc. 63*, followed. *Bhoobun Chander Sen* v. *Ram Soonder Surma Mozoomdar, I. L. R. 3 Calc. 300*, distinguished. An erroneous entry of the name of a proprietor in a notice under s. 6 of Act XI of 1859 does not vitiate a sale. *Ram Narain Koer* v. *Mahabir Pershad Singh, I. L. R. 13 Calc. 208*, followed. The non-issue of a notice under s. 5 of Act XI of 1859 is a mere irregularity, which does not make a sale a nullity, nor shall the sale be annulled upon such ground under s. 33 of that Act, unless such ground should have been specified in the appeal to the Commissioner. *Balkishen Das* v. *Simson, I. L. R. 25 Calc. 833 : L. R. 25 I. A. 151*, and *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70 : L. R. 20 I. A. 165*, followed. *Mohabeer Pershad Singh* v. *The Collector of Tirhoot, 15 W. R. 137*, dissented from. DEONANDAN SINGH v. MANBODH SINGH (1905) . I. L. R. 32 Calc. 111

3 SALE.

———— *Sale for arrears of revenue—Separate shares, sale of—Notification of sale—Specification of share—Material irregularity—Proof of substantial injury resulting—Act XI of 1859, ss. 6, 10, 33.*—Act XI of 1859 requires that the estate or share to be sold must be specified ; the question whether in any particular case the notification sufficiently specifies it, must depend upon the term of the notification. The connection between an irregularity in publishing or conducting a sale under Act XI of 1859 and the inadequacy of price must be established by evidence; the amount or nature of the evidence required in any case must depend upon its own circumstances. ISMAIL KHAN v. ABDUL AZIZ KHAN (1905) I. L. R. 32 Calc. 502 s.c. 9 C. W. N. 343

———— *Revenue sent by money-order—Estate, wrong description of—Mistake—Revenue in arrear—Revenue Sale Law (Act XI of 1859), ss. 8, 20, 33—Land Revenue rules in the Land, Revenue and Cesses in Bengal, rule 29—Jurisdiction.*—Where the actual amount of revenue remitted by money-order reached the Collectorate in time, but the remitter made a mistake in the towji number and the name of the registered proprietor, but was right as to the name of estates and the amount of revenue payable in respect thereof. *Held*, that it was the duty of the officers of the Collectorate

SALE FOR ARREARS OF REVENUE —*continued*

3 SALE—*continued*

to rectify the mistake under rule 29 of the Land Revenue Rules and not to put up the property to sale which, if held, would be without jurisdiction and ought to be set aside. *Bal Krishna Das* v *Simpson, I L R 26 Calc 883 ; L R 25 I A 151*, referred to HAMID HOSSEIN v MUKHDUM BEZA (1905) . . I. L. R. 32 Calc. 229
C. W. N. 306

——— s. 37, exceptions (3) and (4)—*Talukdari tenures created since Permanent Settlement, on portions of which permanent dwelling-houses, gardens, tanks, etc, made—Suit by auction-purchaser to avoid tenure—Pleadings in defence—Decree, directing executing Court to determine portions built on*—The plaintiff, a purchaser of an estate at a revenue sale, sued to recover *khas* possession of certain lands included within it, alleging that the defendants held those lands as a taluk created since the Permanent Settlement. The defendants pleaded that the lands were their raiyati lands created before the Permanent Settlement and that consequently they could not be ejected under exception (3) of s. 37 of Act XI of 1859. The lower Appellate Court found that the land is formed a taluk created after the Permanent Settlement, but that on portions of it permanent dwelling houses tanks and gardens had been made. *Held*, that the plaintiff is entitled to get *khas* possession of the lands held by the defendants excepting such portions of them as are occupied by the dwelling houses, gardens and tanks, etc. *Kiron Chunder Roy* v *Saimuddi Talukdar, I L R 30 Calc 495*, distinguished. *Bhago Bibee* v *Ramkanto Roy I L R 3 Calc 293* , *Ajgur Ali* v *Armut Ali, I L R 8 Calc 110*, and *Gobind Chandra* v *Joy Chandra, I L R 12 Calc 327*, followed. That, although the defendants did not adduce evidence in the case as to the exact position of the portions covered by the dwelling houses, tanks, gardens, etc., the direction of the Lower Appellate Court for the determination of those portions in the execution proceedings is, in the circumstances of the case, just and proper *Brij Sundar* v *Gourg Persand, 8 D A. for 1852 p 645*, referred to Though a person may fail to prove a defence under exception (3) of s 37 of Act XI of 1859, it is still *open to him* to plead that he is protected under the 4th exception. RAJMOHUN MOOKERJI v HASSAN HYDER CHOWDRY (1905)
9 C W. N. 852

4 SEPARATE SHARES

——— *Separate shares—Notification of sale—Specification of share—Residue—Material irregularity—Substantial injury resulting, proof of—Evidence—Revenue Sale Law (Act XI of 1859), ss 6 10 11, 33 Bengal Act VII of 1876, s 70*—Where separate accounts had been opened under ss 10 and 11 of Act XI of 1859 and s. 70 of Act VII (B. C) of 1876, and the sale notification did not specify the share to be sold as required by s 6 of Act XI of 1859, but merely described it as the residue, and stated the amount of the revenue of the entire estate and that of the share to be sold. *Held*, that, as the amount of revenue would not correspond with an *aliquot* share of the lands in the estate, the sale notification was insufficient, and the non specification was a material irregularity. *Ram Narain Koer* v *Mahabir Pershad Singh, I L R 13 Calc 203 ; Dil Chand Mahto* v *Baij Nath Singh, 8 C W. N. 337 ; Ismail Khan* v *Abdul Aziz Khan, ante, p 509*, distinguished. *Annada Charan Mukhuti* v *Kishori Mohan Rai, 2 C W N. 479 ; Hem Chandra Chowdhry* v *Sirat Kamini Dasya, 6 C W. N 596*, followed. The question whether the relation of cause and effect between an irregularity and a substantial injury is proved is essentially one of fact The connection must be established by evidence. The presumption of cause and effect from circumstances irrespective of direct evidence may occasionally be so violent as to exclude the hypothesis of any other cause and may thus be *prima facie* proof *Saadatmand Khan* v *Phul Kumar, I L R 20 All 412*, referred to. NIBARAN CHANDRA CHOWDHRY v. CHIRANJIB PRASAD BOSE (1905) . I. L. R. 32 Calc. 542
9 C. W. N. 487

SALE FOR ARREARS OF REVENUE —*concluded.*

4 SEPARATE SHARES—*continued*

——— *Separate shares, sale of—Notification of sale—Specification of share—Residue—Setting aside sale—Material irregularity—Substantial injury resulting, proof of—Evidence Act (XI of 1859), ss 6, 10, 33*—The non-specification in a notification under s. 6 of Act XI of 1859 of the exact share to be sold in a case where separate accounts had been opened under s. 10 of the Act, is not a material irregularity, if the notification was sufficient to give notice to an intending purchaser as to what was about to be sold *Ram Narain Koer* v. *Mahabir Pershad Singh, I L R 13 Calc 203* followed. Where there is no evidence, direct or otherwise, on which the relation of cause and effect between a material irregularity and an inadequacy of price could be held to be established it cannot, under the provisions of s 33 of Act XI of 1859, be inferred that the one was due to the other *Per* RAMPINI, J *Semble*: Such relation must be proved by direct evidence *Macnaghten* v *Mahabir Pershad Singh, I L R 9 Calc 656 ; L R 10 I A 23 ; Arunachellam* v. *Arunchellam, I L R 12 Mad 13 ; L R 15 I A 171, Tamadduk Rasa Khan* v *Ahmad Husain, I L R. 21 Calc 66 ; L R 20 I A. 176*, referred to *Per* MITRA, J.—It is open to a Court to consider whether upon the whole case, having regard not only to the irregularity and to the inadequacy of price, but to other circumstances, there could be a necessary inference of substantial loss resulting from the irregularity ISMAIL KHAN v ABDUL AZIZ KHAN (1905)
I. L. R. 32 Calc 509
s.c 9 C. W. N. 348

SANAD.

See GRANT . . 9 C. W. N. 1009

SANCTION.

See ADMINISTRATION.

See CIVIL PROCEDURE CODE, s. 539.
9 C. W. N. 151

See RECEIVER . . 9 C. W. N. 247

SANCTION TO PROSECUTE.

See ACT V OF 1861, s. 4 (2).
I. L. R. 27 All. 293

See CRIMINAL PROCEDURE CODE, s. 195.

SCHEDULED DISTRICTS ACT (XIV OF 1874).

——— s. 6, rules under—*"Hearing the appeal," meaning of—Rule 8, power of the High Court under.*—Rule 6 of the rules framed under s. 6 of the Scheduled Districts Act provides that, in appeals from Munsifs' or Assistants' decisions, it shall not be necessary to summon the respondents in the first instance, but the original records shall be called for "and if" after perusing the records, etc., the officer "hearing the appeal" shall see no reason to alter the decision appealed from, he may dismiss the same. Where the Government Agent, to whom the appeal was preferred, sent for and perused the appeal petition and dismissed the same endorsing the order of dismissal on the petition, without fixing a day and hearing the appellant. *Held*, by the High Court on revision under rule 8, that the words "hearing the appeal" necessarily imply that the appellant must be given an opportunity of being heard in support of his appeal and that he has a right to be so heard, if he appears, and that the Agent's order of dismissal must be set aside. YANDAMURI JAGANNADHAM *v.* YANDAMURI SESHACHELAM (1905).
I. L. R. 28 Mad. 404

SEBAIT.

See SHEBAIT.

SECOND APPEAL.

See APPEAL . 9 C. W. N. 154, 636

——— *Grounds of appeal—Reversal by High Court on second appeal of Lower Appellate Court's decision—"Substantial error or defect of procedure"—Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Suit to set aside adoption—Question whether adoption was real and binding*—In a suit in which the plaintiff prayed that it might be declared that the defendant was not her properly and legally adopted son, that the ceremony of adoption did not take place, and that, if it did, it was ineffectual and invalid owing to misrepresentation, coercion and fraud, the first Court found that there was a real adoption binding on the plaintiff. The Lower Appellate Court found that, though an adoption had taken place, it was not, and was not intended to be a real adoption, but was a sham transaction entered into by collusion for the purpose of deceiving the Government, a case which was not set up by the parties, nor warranted by the evidence. *Held* (affirming the decision of the High Court), that such a disposal of the suit was a "substantial error of defect or procedure" within the meaning of s. 584 of the Civil Procedure Code (Act XIV of 1882), and that the High Court therefore had jurisdiction to set aside the finding on second appeal. *Annangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani, L. R. 14 I. A. 101*, and *Durga Chowdhrani* v. *Jowahir Singh Chowdhri, L. R. 17 I. A. 122*, referred to. SHIVABASAVA *v.* SANGAPPA (1905).
I. L. R. 29 Bom. 1
s.c. L. R. 31 I. A. 154

——— *Debutter—Words of dedication—Second appeal—Construction of document—Grounds.*—Where a document of title, which was the foundation of the whole of the plaintiff's claim in the suit, was misconstrued by the Lower Appellate Court: *Held*, that it was open to the High Court in second appeal to interfere with the findings of the Lower Appellate Court arrived at on a misinterpretation of the meaning of the passages of the document. *Nawbut Singh* v. *Chutter Dharee Singh, 19 W. R. 222*, referred to. HARA SUNDAR MAJUMDAR *v.* BASUNTA KUMAR ROY (1905).
9 C. W. N. 154

SECURITY FOR COSTS.

See EXECUTION OF DECREE.
I. L. R. 32 Calc. 494

SECURITY FOR GOOD BEHAVIOUR.

See CRIMINAL PROCEDURE CODE, ss. 110, 112, 190, 191 AND 526.
I. L. R. 27 All. 172, 262, 293

SECURITY FOR KEEPING THE PEACE.

See CRIMINAL PROCEDURE CODE, ss. 107, 118 AND 406 . I. L. R. 26 All. 623

——— *Jurisdiction—Bond, cancellation of before actual execution—Criminal Procedure Code (Act V of 1898), ss. 107, 125—Appeal—Revision.*—S. 125 of the Criminal Procedure Code does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace made by Courts subordinate to his own, but it confers on him an original jurisdiction. After a bond to keep the peace has been executed, a District Magistrate may hold, for sufficient reasons, that it is no longer necessary and cancel it; but he has no power to declare that it was never necessary. The [illegible] from an order requiring security to keep the peace. BARKA CHANDRA DEY *v.* JAGADISH CHANDRA [illegible]
I. L. R. [illegible]

SECURITY FOR KEEPING THE PEACE—*concluded*

——— *Dispute relating to possession of land—Institution of proceedings—Discretion of Magistrates—Criminal Procedure Code (Act V of 1898), ss 107, 144, 145*—Where a dispute relating to possession of land is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under s. 107 or under ss 144 and 145 of the Criminal Procedure Code *Saroda Prosad Singh* v *Emperor, 7 C W N 142* not followed. *King Emperor* v *Basiruddin Mollah 7 C W N. 745*, and *Belagal Ramacharlu* v *Emperor, I L R 26 Mad. 471* followed SRIDHAR ROY v CHATTER ROY (1903) . I L R. 32 Calc. 986

——— *Whether a sanction granted to a particular person could be availed of by some other person—Criminal Procedure Code (Act V of 1898) s 195*—A sanction for prosecution expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority *Giridhari Mondul* v *Uchit Jha, I L R 9 Calc 435; Baperam Surma* v *Gouri Nath Dutt, I L R 20 Calc 474, In re Banarsi Das I L R 18 All 215; Kali Kinkar Sett* v *Nrityo Gopal Roy*, 8 C W N 883, and *Durga Das Rukhit* v *Queen Empress, I L R 27 Calc 820*, referred to JOGENDRA NATH MOOKERJEE v SARAT CHANDRA BANERJEE (1905) I L R. 32 Calc 351

SERVICE TENURE

See LEASE . I L R. 32 Calc 243

SESSIONS COURT

See CRIMINAL PROCEDURE CODE

SESSIONS JUDGE, POWER OF

See CRIMINAL PROCEDURE CODE

See REMAND

SET OFF

See CIVIL PROCEDURE CODE

See SUIT, MAINTAINABILITY OF I L R 32 Calc 654

SETTLEMENT OFFICER, JURISDICTION OF.

See BENGAL TENANCY ACT

See JURISDICTION I L R 32 Calc 162

See RECORD OF RIGHTS I L R 32 Calc. 518

SHEBAIT.

See CONTRACT ACT, s 70. 9 C W. N 421

See PARTIES ADDITION OF

See WILL.

SHERI LANDS.

See ENDOWMENT

See LAND REVENUE CODE I L R. 29 Bom. 415

SHIAH VENDOR.

See MAHOMEDAN LAW I L R. 32 Calc 982

SLANDER.

——— *Suit for damages, maintainability of, in the Civil Court—Slander—Words spoken not defamatory to the person bringing the action*—A suit for damages for an alleged slander will not lie in the Civil Court at the instance of any person, when the words complained of are neither defamatory of him nor have they caused him any injury *Per* HARRINGTON, J—A witness is not entitled to claim privilege for a slanderous statement wantonly made which is neither an answer to any question addressed to him in examination or cross examination, nor has any connection at all with the case under trial GIRWAR SINGH v SHAMAN SINGH (1905) I L R 32 Calc 1060 s.c 9 C W. N 847

SMALL CAUSE COURTS, MOFUSSIL TOWNS.

——— Sch. 2, Art. 13—*Dues to which a person is entitled by reason of his interest in a religious institution—Suit for a share of presents made to a religious institution—Maintainability*—A suit by a member of religious association to recover his share of the "voluntary payments" made to the association is a suit within the meaning of Art. 13 Sch 2 of the Provincial Small Cause Court Act for "dues" to which a person is entitled "by reason of his interest in a religious institution," and as such it is excepted from the cognisance of a Court of Small Causes. *Mahadeo* v *Budhai Ram, I L R 26 All 360* commented on. BUA VADASAN v NARAYANA SOMAYAJIPAD (1905) I L R 28 Mad. 202

——— Sch 2, Art. 13—*Suit for account what is*—A suit for an account within Art. 31 of the Provincial Small Cause Courts Act does not mean every case in which accounts have to be looked into to ascertain the amount due to the plaintiff A suit for an account is a special form of suit, in which a special process is required to take an account. KONDURU RUNGA REDDI v SUBBIAH SETTY AND KUMBAHALA SUBBAMMA (1905) I L R. 28 Mad. 394

SMALL CAUSE COURTS, PRESIDENCY TOWNS

See CIVIL PROCEDURE CODE, s 111 9 C W. N. 748

——— s 17.

See NEW TRIAL, APPLICATION FOR I L R. 32 Calc. 339

SMALL CAUSE COURTS, PRESIDENCY TOWNS—*concluded.*

——— *Jurisdiction—Post Office Act (VI of 1898), s. 34—Value-payable article—Liability of Government to sender when value not collected from addressee—Duty of post office to collect value payable—Liability for neglect to do so.*—The plaintiff delivered a parcel containing silver jewellery to the postal authorities for transmission to Colombo as a value-payable article. He also registered and insured it for Rlls. The fees were duly paid, receipts obtained, and the post office took charge of the parcel. By the mistake of a clerk the parcel was delivered to and accepted by the addressee without its value being collected from him. This suit was brought to recover the value of the parcel from the defendant, as the post office would neither pay the money to plaintiff nor return the article. The defendant relied *inter alia* upon s. 34 of the Indian Post Office Act, 1898. The proviso to s. 34 runs as follows:—Provided that the Secretary of State for India in Council shall not incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee. *Held,* that the defendant was liable. The effect of the proviso is that the post office does not guarantee the collection of the money, but the proviso does not absolve the post office from the common law liability to pay damages for delivering a parcel without collecting the money in pursuance of his undertaking to do so. By its contract the post office is bound to collect the money, when it delivers the article. If, for any reason, it neglects to do so, it commits a breach of contract for which it is liable in damages. The measure of the damages being the value of the article lost. A Small Cause Court has jurisdiction to entertain such a suit, it being a suit on contract and not on tort. MOTHI RUNGAYA CHETTY *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1905).

I. L. R. 28 Mad. 213

SOUTH CANARA.

——— *Forest and waste lands—Rebuttable presumption of Government ownership—Conclusive presumption under Hindu and Mahomedan Law—Warg land—Right of wargdar over waste lands adjacent to his cultivated land—Kumaki and Netticut rights—Acts of user and occupation consistent with proprietary right of Government.*—There is a general presumption that forest and immemorial waste land in South Canara, not exclusively occupied by any person or body of persons, is the property of the Government. In the case of the large tracts of immemorial forest on the ghats and elsewhere in South Canara, there is a presumption of fact that they are Government forests, though such a presumption is rebuttable, by proof of private ownership in regard to any particular part of the forest. In the case of forests of secondary growth, the presumption will usually be that they belong to some private owner, but this may be rebutted by showing that any portion forms part of a warg that was abandoned or forfeited or escheated to Government, or by showing that it was not part of a warg,

SOUTH CANARA—*concluded.*

but was cultivated as Kumri. In order to rebut the presumption of Government ownership in forest and immemorial waste land it is necessary that there should be proof of the exercise, both in the past and in the present, of acts of undoubted ownership, such, for instance, as the granting of leases to tenants for cultivation, and the cutting of valuable timber trees for sale and not such acts as the Government permits in forest and waste land for the benefit of the adjacent cultivation. "Kumaki" and "Netticut" privileges, which are conceded to all wargdars for the better enjoyment of their warg lands adjacent to Government forest do not by any means prove exclusive proprietary right as against Government. "Netticutt" privileges are enjoyed by such wargdars as have their wargs situated in valleys lying between the slopes or ridges of hills. Each ridge or Netticutt forms a natural boundary, within which a cultivator grazes his cattle. Kumaki lands are lands which are allowed to be used in assisting cultivation and they are intended to afford to the ryots the means of procuring leaves for manure and to furnish fodder for their cattle. History of the Revenue System obtaining in the District of South Canara reviewed. *Subbaraya* v. *Krishnappa, I. L. R. 12 Mad. 422,* approved. *Bhaskappa* v. *The Collector of North Kanara, I. L. R. 3 Bom. 452,* approved and followed. THE SECRETARY OF STATE FOR INDIA *v.* KRISHNAYYA (1905) . . I. L. R. 28 Mad. 257

SPECIAL OR SECOND APPEAL.

——— ss. 584, 585—*Second appeal—Grounds of appeal—Reversal by High Court on second appeal of lower Appellate Court's decision—"Substantial error or defect of procedure"—Suit to set aside adoption—Question whether adoption was real and binding.*—In a suit in which the plaintiff prayed that it might be declared that the defendant was not her properly and legally adopted son, that the ceremony of adoption did not take place, and that if it did, it was ineffectual and invalid owing to misrepresentation, coercion and fraud, the first Court found that there was a real adoption binding on the plaintiff. The lower Appellate Court found that though no adoption had taken place it was not, and was not intended to be, a real adoption, but was a sham transaction entered into by collusion for the purpose of deceiving the Government, in a case which was not set up by the parties, and not warranted by the evidence. *Held* (affirming the decision of the High Court) that such a disposal of the suit was a "substantial error or defect of procedure" within the meaning of s. 584 of the Civil Procedure Code (Act XIV of 1882), and that the High Court therefore had jurisdiction to set aside the finding on second appeal. *Ananga-manjari Chowdhrani* v. *Tripura Soondari Chowdhrani, L. R. 14 I. A. 101,* and *Durgadhrani* v. *Jewhir Singh Chawdhri, L. R. 17 I.A. 122,* referred to. SHIVABASAVA *v.* SANGAPPA (1905).

I. L. R. 29 Bom. 1
s.c. L. R. 31 I. A. 154

SPECIFIC PERFORMANCE.

See LANDLORD AND TENANT
I. L. R. 29 Bom 580

——— *Issues—Discretion of Court—Delay—Laches—Specific Relief Act (I of 1877), s 22—Purchase at Court sale—Purchase subject to subsisting equities—Right title and interest of judgment-debtor*—The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a chawal and vacant land The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November 1903 The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim. *Held* that even if a purchaser at a Court-sale purchases without notice, he can only buy what the Court could sell, *i.e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself *Sobhagchand v. Bhaichand, I L R 6 Bom 193*, followed. *Held*, further that the purchase by the third defendant was subject to the equity in favour of the plaintiff to compel specific performance unless that equity had been lost by the plaintiff The third defendant did not plead delay as a defence or raise a specific issue on the point. *Held*, the purpose of a general issue is certainly not that pleas should be allowed under it which are not clearly included in the other issues, but only to determine the kind of relief to which a plaintiff is entitled as the result of the findings on the issues preceding it. When, however, a decree for specific performance is sought it is the duty of the Court to see, whether having regard to the judicial discretion vested in it under s 22 of the Specific Relief Act (I of 1877) it ought to be granted. The proper issue to be raised in such a case is—"Whether the plaintiff's delay has been such as to show that he had lost his right by waiver, abandonment, or acquiescence?" Laches to bar the plaintiff's right must amount to waiver abandonment, or acquiescence and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. PEER MAHOMED v. MAHOMED EBRAHIM (1905)
I. L. R. 29 Bom. 234

——— *Suit for—Lease—Covenant for renewal—Construction of document—Time whether or not of the essence of the contract*—The plaintiff sued for specific performance of a covenant for renewal contained in a lease the material clause of which was as follows:—"after the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration. *Held*, on a construction of the lease that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal. JAGGI LAL v. SIR W. E. COOPER (1905) . . . . I. L. R. 27 All. 666

SPECIFIC RELIEF ACT (I OF 1877).

——— s. 9.

See LIMITATION ACT, SCH. II, ART 142
9 C. W. N. 1061

——— s 9—*Civil Procedure Code (Act XIV of 1882), s 622—Tenant holding over—Dispossession by landlord—Suit by tenant to recover possession—Extraordinary jurisdiction*—A tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord. The tenant then brought a suit for possession against the landlord under s. 9 of the Specific Relief Act (I of 1877) The Subordinate Judge dismissed the suit. The plaintiff (tenant) thereupon applied under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) *Held*, reversing the decree that the plaintiff (tenant) was not liable to be evicted by the defendant landlord *proprio motu* and that he was entitled to a decree for possession *Per* HATCHELOR, *J*:—"To read the words 'due course of law' in s 9 of the Specific Relief Act as merely equivalent to the word 'legally' is, we think, to deprive them of a force and a significance, which they carry on their very face. For a thing, which is perfectly legal, may still be by no means a thing done 'in due course of law', to enable this phrase to be predicated of it, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law and the 'due course of law' means, we take it, the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication That, in our opinion, is the primary and natural meaning of the phrase, though it may be applied in a derived or secondary sense to other proceedings held under the direct authority of the law; in this sense it may be said, for instance, that revenue or taxes are collected in due course of law" The only issue tried by the Subordinate Judge was—"Whether the plaintiff was wrongly dispossessed within six months before the suit." *Held* that the plaintiff's remedy lay in an application under the extraordinary jurisdiction (s 622 of the Civil Procedure Code, Act XIV of 1882), inasmuch as that issue was not one upon which the dispute between the parties could be properly adjudicated upon RUDRAPPA v. NARSINGRAO (1905) . . I. L. R. 29 Bom. 213

——— s 9—*Immoveable property—Actual and constructive possession—Landlord and tenant—Dispossession by third party—Suit by landlord—Maintainability*—A landlord holding possession

SPECIFIC RELIEF ACT (I OF 1877)—*continued.*

through a tenant can bring a suit under s. 9, Act I of 1877, to recover possession of property of which he has been dispossessed by the act of a third party. *Innasi Pillai* v. *Sivagnana Desikar, C. R. No. 643 of 1893, unreported,* followed. JAGANNATHA CHARRY v. RAMA RAYER (1905).

I. L. R. 28 Mad. 238

——— s. 18.

See SALE . . 9 C. W. N. 1019

——— s. 18—*Contract relating to property of minor—Guardian, liability of.*—Where a contract to sell immoveable property was entered into, without any legal necessity, by the defendant, not in her personal capacity and not on the representation that the property was her own, but as the next friend of her minor son, and the parties contemplated that, unless the sanction of the District Judge were obtained, the bargain was to come to an end, and before such sanction was obtained the minor died, leaving the defendant as his heir: *Held*, that the agreement could not be specifically enforced against the defendant. S. 18 of the Specific Relief Act has no application, where the defendant never contracted to sell property, as if it were her own. RASHMONI DASI v. SURJA KANTA ROY CHOWDHRY (1905).

I. L. R. 32 Calc. 832

——— s. 21—*Civil Procedure Code, s. 523—Arbitration—Agreement to refer made pending a suit—Such agreement a bar to the continuance of the suit.*—Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of s. 523 of the Code of Civil Procedure or not. *Salig Ram* v. *Jhunna Kuar, I. L. R. 4 All. 546; Sheoambar* v. *Deodat, I. L. R. 9 All. 168,* and *Shib Lal* v. *Hira Lal, Weekly Notes, 1888, p. 133,* followed. SHEO DAT v. SHEO SHANKAR SINGH (1905).

I. L. R. 27 All. 534

——— s. 22.

See SPECIFIC PERFORMANCE.

I. L. R. 29 Bom. 234

——— s. 22—*Specific performance of contract—Discretion of Court—Delay in applying to Court for relief.*—Great delay on the part of the plaintiff in applying to the Court for specific performance of a contract, of which he claims the benefit, is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. *Milward* v. *The Earl of Thanet, 5 Ves. 720n.*, referred to. NAWAB BEGAM v. CREET (1905) . I. L. R. 27 All. 678

——— s. 22—*Specific performance - Issues—Discretion of Court—Delay—Laches—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor.*—The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 quare yards of land forming part of a property consisting of a chawl and vacant land. The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim. *Held*, that even if a purchaser at a Court-sale purchases without notice, he can only buy what the Court could sell, *i.e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand* v. *Bhaichand, I. L. R. 6 Bom. 193,* followed. PEER MAHOMED v. MAHOMED EBRAHIM (1905).

I. L. R. 29 Bom. 234

——— s. 39—*Suit for declaration—Cancellation of document—Consequential relief.*—The plaintiff having sued for the cancellation of a sale deed framed the prayer in the plaint so as to seek a declaration that the sale deed was fraudulent and for an order to have it cancelled and a copy was sent to the Sub-Registrar as provided by s. 39 of the Specific Relief Act (I of 1877). *Held*, that the suit was one for a declaration with a distinct prayer for consequential relief. *Karam Khan* v. *Daryai Singh, I. L. R. 5 All. 331,* dissented from. PARVATIBAI v. VISHVANATH (1905) . I. L. R. 29 Bom. 207

——— s. 39—*Limitation Act (XV of 1877), Art. 91—Suit to set aside an instrument—Collusive sale deed not intended to be acted upon.*—A suit to cancel or set aside an instrument must, under Art. 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The plaintiff on 1st June 1895 executed a sham sale deed in favour of the defendants neither party intending that it should be acted upon. The defendants in February 1899 began to set up a claim to ownership on the strength of the deed. On 3rd August 1900, plaintiff brought this suit. On its being contended that the suit was barred by limitation:—*Held*, that the suit was not barred having been brought within three years from the date when the plaintiff apprehended that the defendants had set up a title under the instrument. The facts which would entitle a person to bring such a suit are stated in s. 39 of the Specific Relief Act (I of 1877). SINGARAPPA v. TALARI SANJIVAPPA (1905).

I. L. R. 28 Mad. 349

——— s. 42.

See BOMBAY REVENUE JURISDICTION ACT.

I. L. R. 29 Bom. 19

——— s. 42.

See HINDU LAW . I. L. R. 32 Calc. 62

——— s. 42.

See HINDU LAW—ALIENATION.

9 C. W. N. 25

SPECIFIC RELIEF ACT (I OF 1877)—*continued.*

———s. 42—*Declaratory decree—Discretion of Court—Joint Hindu family—Non joinder of parties*—Where some of the descendants of a judgment-debtor under two Rent Court decrees filed a suit in a Civil Court, asking for a declaration that the joint ancestral family property was not liable, after the decease of the judgment-debtor, to be taken in execution of such decrees, and did not make parties to the suit the two sons of the judgment debtor, it was held that the Court exercised a right discretion under s. 42 of the Specific Relief Act, 1877, in refusing to grant a declaratory decree MAHARAJA OF BENARES v RAMJI KHAN (1905)
I. L. R. 27 All. 138

———s. 42—*Suit by heir presumptive against life tenant to restrain waste by life tenant—Injunction*—There is nothing in law to prevent the heir presumptive, that is, the person, who would be entitled to possession, if the life tenant were to die at the moment of suit, *from suing for a declaration* that as against the life tenant he is entitled as next reversioner, and for an injunction restraining the life tenant from wasting the property in suit. *Rani Anand Koer v The Court of Wards, L. R S I A 14*, followed. *Gangayya v Maha lakshmi, I L R 10 Mad 90*, referred to *Greeman Singh v Wahari Lall Singh, I L R 8 Calc 12*, dissented from MANMATHA NATH BISWAS v ROHINI MOYI DASI (1905)
I. L. R. 27 All. 408

———s. 42—*Discretion of Court to make declaratory decree—Limitation Act (XV of 1877), s 7—Suit by minor for declaration of invalidity of widow's alienation—Omission by father of minor to sue—Father's right to sue barred—Hindu Law—Suit for declaration of invalidity of widow's alienation—Plaintiff not nearest reversioner—Maintainability*—Plaintiff, a minor, sued for a declaration that an alienation by a Hindu widow was invalid as against him after the death of the widow Plaintiff was not the nearest reversioner, there being certainly one and apparently two sets of reversioners, who would be entitled to take in succession before him. Plaintiff's father had not brought any suit, though he could have done so, and the father's right to bring such a suit had become barred The nearest reversioner had concurred in the improper alienation and all the reversioners nearer than plaintiff had omitted to sue and were barred from doing so by limitation. They were all parties to the suit—*Held*, that the suit was not barred by limitation. Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, *no one of such* reversioners can be held to claim through or derive his title from another reversioner, even if that other happens to be his father, but each derives his title from the last full *owner* Plaintiff *was therefore* entitled to the benefit of s. 7 of the Limitation Act. There is no privity of estate between one reversioner and another as such, and, consequently, an act or omission by one *reversioner* cannot bind another reversioner, who does not claim through him. *Bhagwanta v Sukhi, I L R 22 All 33*, approved. *Chhagan-*

SPECIFIC RELIEF ACT (I OF 1877)—*continued.*

ram Adhikram v Bai Motigauri, I. L. R. 14 Bom. 512, discussed. *Held also*, that plaintiff was entitled to maintain the *suit A more distant reversioner* may maintain such a suit, when the reversioners nearer in succession are in collusion with the widow or have precluded themselves from suing. The right given by s. 42 of the Specific Relief Act to bring a declaratory suit *is not limited by illustration (k) of* that section or by Art. 125 of the Limitation Act to suits by a person presumptively entitled to possession. The general words of a section should not be limited to the illustrations given in the Act or by reference to the *suits specially enumerated in the* Limitation Act. Though it was doubtful whether the lower Court should, in the exercise of its discretion, have allowed the suit to proceed, having regard to the remoteness of plaintiff's interest, the High Court made the declaration prayed *for, as the finding of fact was* that the alienation had been made without necessity and was improper, and it might be that, when the widow should die the plaintiff would be the presumptive reversioner, and the declaration now made would save him from having to *prove* the impropriety of the alienation again. *Per* DAVIES, *J.*—The declaration made in the present suit would serve the purpose of perpetuating testimony for whomsoever might happen to be *the next reversioner on the death of the widow.* GOVINDA PILLAI v THAYAMMAL (1905).
I. L. R. 28 Mad. 57

———s. 42—*Discretionary power of Court in granting declaration—Declaration in respect of a void instrument—Courts, inherent powers of, to stay or dismiss vexatious suits—Court Fees Act—Ad valorem stamp not necessary in suits for declaration, where no consequential relief asked*—Every Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof actions which it holds to be vexatious *Haggard v Pelicier Freres* [1892], *A C 61 at pp 67, 69*, referred to. Where the facts alleged in a plaint are totally inconsistent with decisions pronounced on the simplest materials, in litigation extending over three *quarters of a century, such a* plaint ought to be dismissed summarily in the exercise of such inherent power. The discretionary power to grant declaratory decrees under the Specific Relief *Act ought not to be exercised, when the plaintiff seeks* to have declared as invalid and void a transact on which, on his own allegations, would be but a *brutum fulmen* so far as his rights are concerned. *Thakurain Jaipal Kunwar v. Bhaiya Indar Bahadur Singh, L. R 31 I A 67 at p. 69.* It will be no ground for the grant of such discretionary relief, that the transaction in question may furnish a piece of evidence against the plaintiff. Where a plaint merely prays that a will *in regard to a property may be* declared void as against the plaintiff, the stamp duty payable is that for a declaratory suit, and not an *ad valorem* fee on the value of such property VELIASWAMI TEVAR v SASIVARMA TEVAR (1905)
I. L. R. 28 Mad. 560

———s. 52.

See MAINTENANCE . 9 C. W. N. 1073

SPECIFIC RELIEF ACT (I OF 1877)—*concluded.*

——— s. 54—*Bengal Tenancy Act (VIII of 1885), s. 23—Agricultural purpose—Building of indigo factory—Specific Relief Act (I of 1877), s. 54, Ill. (k)—Injunction restraining tenant from rendering land unfit for tenancy—Suit, if maintainable.*—The cultivation of indigo is an agricultural purpose, but the manufacture of indigo cakes out of indigo plants cannot be said to be an agricultural purpose. Where land is let out for agricultural purposes *generally*, the erection of an indigo factory on a part of such land must render it unfit for the purposes of the tenancy; and the landlord would be entitled to sue for an injunction restraining the tenant from building such factory on the land. SURENDRA NARAYAN SINGH *v.* HARI MOHAN MISSER (1905). 9 C. W. N. 87

STAMP ACT (II OF 1899).

——— s. 2 (5) (b)—*Promissory Note.*—The defendant passed to the plaintiff a document to this effect: I have this day taken from you in cash R48 (forty-eight). I have received this amount. I shall repay this money without taking any objection, when you should demand [it]." The document was attested by two witnesses. It bore a one-anna adhesive stamp. *Held*, on a construction of the document, that it was a bond within the meaning of s. 2 (5) (*b*) of the Indian Stamp Act (II of 1899); since the document was attested and was not payable to order or bearer, and the executant obliged himself to pay the money to another. VENKU *v.* SITARAM (1905). I. L. R. 29 Bom. 82

——— s. 2 (15), Sch. I, Art. 45.

See PARTIES, ADDITION OF. I. L. R. 32 Calc. 483

——— s. 2 (15)—*Civil Procedure Code (Act XIV of 1882), s. 396—Decree for partition—Commissioner's report—Decree in accordance—Final order—Instrument of partition—Stamp.*—A decree for partition passed in accordance with a Commissioner's report under s. 396 of the Civil Procedure Code (Act XIV of 1882) is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition under s. 2 (*15*) of the Indian Stamp Act (II of 1899). BALARAM *v.* RAMKRISHNA (1905) . . I. L. R. 29 Bom. 366

——— s. 24—*Mortgage deed—Exemption from duty—Statute—Construction—Exemption.*—The proviso to s. 24 of the Stamp Act (II of 1899) contemplates that to entitle the mortgagor to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof. An enactment imposing a burden requires a strict construction in favour of the subject; but an exemption must be strictly construed in favour of the State. IN RE NIRABAI (1905) . . . . I. L. R. 29 Bom. 203

——— Sch. I, Art. 1—*Construction of document—Promissory note—Acknowledgment.*—Three persons borrowed money from a fourth, and at the time a memorandum signed by the borrowers was drawn up in the following terms:—"Account (*lekha*) of Bhawani Din Kalwar, Katwari Kalwar and Bindesri Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd May 1901, R500 borrowed from Udit Upadhya for a sugar factory." The document contained no promise to repay the money. *Held*, that this was a mere memorandum, which might perhaps amount to an acknowledgment such as would require a 1-anna stamp, which it bore, but was certainly neither a promissory note nor an acknowledgment coupled with a promise to repay, which would require a stamp of higher value, and would not exclude parol evidence of the contract. UDIT UPADHYA *v.* BHAWANI DIN (1905) . . . . I. L. R. 27 All. 84

STAMP ACT (II OF 1899)—*concluded.*

STARE DECISIS.

———*Its value in the department of procedure.*—The principle of *Stare decisis* is of undoubted value in its bearing on the law of property, but the doctrine is not of the same importance in the department of procedure when the practice of one Court is to be brought into conformity with the settled practice of other Courts and the plain terms of the Code. MANILAL HARGOVANDAS *v.* VANMALIDAS AMRATLAL (1905) . . . . I. L. R. 29 Bom. 621

STATUTES.

——— *Construction of—Pensions Act (XXIII of 1871), s. 4—Bombay Revenue Jurisdiction Act (X of 1876), s. 4, proviso.*—The general presumption is against construing a statute as ousting or restricting the jurisdiction of the superior Courts. The intention must be expressed in clear terms, not merely implied, but necessarily implied: the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Act of Parliament. Such statutes are to be strictly construed when their language is doubtful. A construction, which would impliedly create a new jurisdiction, is to be avoided, especially where it would have the effect of depriving the subject of his freehold or of any common law right, or of creating an arbitrary procedure. No doubt when a power has been conferred in unambiguous language by statute the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose. Nor does any presumption arise against the finality of a decision by an authority with statutory powers to pronounce in respect of a duty or liability created by the statute. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905) . I. L. R. 29 Bom. 480

"STREET."

———*Discharge into drains not forming part of street—Definition of street.*—A defendant was charged under s. 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed: *Held*, that a "street" is any way or road in a city having houses on both sides,

"STREET"—*concluded*

and that in consequence this definition excluded the drain or ditch on either side of the roadway; that the drain was not part of the "street," and that the offence charged had not been committed VENKATA RAMA CHETTI *v* EMPEROR (1905) I. L. R. 28 Mad. 17

STRIDHAN.

See HINDU LAW I. L. R. 32 Calc. 261
9 C. W. N. 109, 119

See MORTGAGE . 9 C. W. N. 914

See WILL . . 9 C. W. N. 769

SUCCESSION.

See ADVERSE POSSESSION I. L. R. 27 All. 436

See CIVIL PROCEDURE CODE, s 215 I. L. R. 27 All. 374

See CIVIL PROCEDURE CODE, ss 278 AND 283 . . I. L. R. 27 All. 464

See COURT FEES ACT, s 7, SCH I I. L. R. 27 All. 447

See CRIMINAL PROCEDURE CODE, ss. 87, 88 AND 89 . I L. R. 27 All. 572

See HINDU LAW I. L. R. 27 All. 66

See HINDU LAW I. L. R. 29 Bom. 91
I. L. R. 27 All. 581, 634

See JOINT PROPERTY I. L. R 27 All. 153

See PLEADINGS . I. L. R. 27 All. 78

See PROVINCIAL SMALL CAUSE COURTS ACT, SCH II, ART 23 I. L. R. 27 All. 622

——— to recover profits of sir land in an undivided mahal

See LIMITATION I L. R. 7 All. 348

——— to set aside mortgages on the ground of insanity

See CONTRACT ACT, s 12 I. L. R. 27 All. 1

See WILL.

SUCCESSION ACT (X OF 1865)

——— ss. 3, 179, 187, 260.

See EVIDENCE I. L. R. 32 Calc 710

——— s. 51.

See WILL . I. L. R. 29 Bom. 530

——— s. 282.

See CIVIL PROCEDURE CODE I. L. R. 29 Bom. 96

SUCCESSION CERTIFICATE ACT (VII OF 1889).

——— s. 4 (1) (a)—*Suit for account—Debt, recovery of*—A suit for account is not a suit for the recovery of a debt within the meaning of s. 4 of the Succession Certificate Act. The plaintiff, as heir of a deceased person, sued the defendant, who was the latter's agent, for an account. *Held*, that he was entitled to judgment against the defendant for an account without producing a succession certificate. *Sahiba Sahib v Noordin Sahib*, I. L. R. 22 Mad. 139, referred to. ISSESWAR ROY *v* DURGA DAS MUNDRA (1905) . I. L. R. 32 Calc 418

——— s. 4 (1) (a)

See LIMITATION I. L. R. 32 Calc 126

See SUCCESSION CERTIFICATE I. L. R. 32 Calc. 418

——— s. 5—*Succession certificate not to be questioned by any Court in subsequent proceedings based thereon.*—Where a certificate of succession had been granted by a Court empowered under Act VII of 1889 to grant such certificate, it is not open to a Court, before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court, which granted the certificate. DURGA DAS *v* GEETU (1905) . . . I L. R 27 All 87

——— s. 7 (3)—*Application for certificate to collect debts—Objection as to status of family of deceased—Inquiry necessary*—Where, on an application for a certificate to collect debts due to a deceased person made by the widow, an objection was filed by a nephew of the deceased that he and the deceased were members of a joint Hindu family and therefore no certificate could be granted to the widow; it was *held* that the Court was bound to make some inquiry, not necessarily an exhaustive one, into the facts set up by the objector, and was not warranted in passing an order granting a certificate without making any inquiry at all. BALMAKUND *v* KUNDAN KANWAR (1905) . . I. L. R 27 All. 452

SUIT.

See CIVIL PROCEDURE CODE. I. L. R. 29 Bom. 219

———*Maintainability of suit—Civil Procedure Code (Act XIV of 1882), ss 43, 111—Set-off—Previous suit—Omission to claim set off in the previous suit in respect of the sum due—Effect of such omission—Cross suit*—In a previous suit brought by *A* against *B*, the latter had claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts between the parties, and had omitted to claim a set-off in respect of the remainder. In a subsequent suit brought by *B* against *A* for the remainder, the defence was that the suit was not maintainable. *Held*, that *B* having claimed a set-off in respect of part of the cause of action in the previous suit brought against him, was debarred under s 43 of the Civil Procedure Code from bringing this suit. NAWRUT PATTAK *v* MAHESH NARAYUN LAL (1905) I. L. R. 32 Calc. 654

SUIT—*concluded.*

———— *Suit for costs—Costs incurred in criminal prosecution—Damages.*—A suit will not lie to recover the expenses incurred by the plaintiff in prosecuting the defendant in a criminal Court. *Fazal Imam* v. *Fazal Rasul, I. L. R. 12 All. 166,* approved. CHURAMONI DASI v. BAIDYA NATH NAIK (1905). I. L. R. 32 Calc. 429

———— *Partition suit—Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit—Decree dismissing appeal—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 373 and 582.—Held,* that when in a partition suit defendants have by concession of the plaintiff acquired rights, which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing from the suit in the Appellate Court. SATYABHAMABAI v. GANESH BALKRISHNA (1905). I. L. R. 29 Bom. 13

SUITS VALUATION ACT (VII OF 1887).

———— s. 8.

See JURISDICTION I. L. R. 32 Calc. 734

See LIMITATION I. L. R. 32 Calc. 716

See PRINCIPAL AND AGENT. I. L. R. 32 Calc. 719

SUNNI LAW.

See MAHOMEDAN LAW. I. L. R. 32 Calc. 982

SURETY.

See CIVIL PROCEDURE CODE. I. L. R. 29 Bom. 29

See PROBATE AND ADMINISTRATION ACT.

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TALAB-I-ISHTASH-HAD.

See MAHOMEDAN LAW. 9 C. W. N. 982

TALUKDARI TENURE.

See SALE FOR ARREARS OF REVENUE.

TENANT.

See MAGISTRATE . 9 C. W. N. 935

TENANTS-IN-COMMON.

See ADOPTION.

———— *Adverse possession—Exclusive receipt of profits by one tenant continuously for a long time—Presumption as to actual ouster of other tenants-in-common.*—To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. GUNGADHAR v. PARASHRAM (1905) . . I. L. R. 29 Bom. 300

THAK MAP.

———— *Estate—Lands*—Because certain lands are shown in the *thak* map as comprised in a certain estate, that ought not to be taken as conclusive evidence that the lands are a part of that estate. GOPAL CHANDRA DAS v. HARA SUNDARI DASI (1905). 9 C. W. N. 383

THEFT.

See CRIMINAL PROCEDURE CODE.

See PENAL CODE . 9 C. W. N. 974

THUMB MARK.

———— *Blurred impressions—Expert opinion, grounds of—Judge—Jury—Power of Judge to question the Jury—Criminal Procedure Code (Act V of 1898), s. 303.*—Where certain thumb-impressions were blurred, and many of the characteristic marks, therefore, far from clear, thus rendering it difficult to trace the features enumerated by an expert as showing the identity of the impressions, and the Court could only find a distinct similarity in some respects, *e.g.*, pattern and central core:—*Held,* that the Jury were not wrong in refusing to accept the opinion of the expert. *Per* GEIDT, *J.*—A Jury may decline to accept the opinion of an expert without the corroboration of their own intelligence as to the reasons which guided him to his conclusion with respect to the identity of the impressions. *Per* HENDERSON, *J.*—It is only when it is necessary to ascertain what the verdict really is that s. 303 of the Criminal Procedure Code justifies the Judge in putting questions to the Jury. Where, therefore, on a charge under s. 82 (c) of the Registration Act (III of 1877), the verdict was a plain and simple one of not guilty, the Judge was not empowered to ask the Jurors whether they found that the thumb-impression on the bond alleged to have been forged was that of the accused. EMPEROR v. ABDUL HAMID (1905). I. L. R. 32 Calc. 759

———— *Accused—Signature—Thumb impression—General Clauses Act (X of 1897), s. 3, cl. 52—Criminal Procedure Code (Act V of 1898), s. 164.*—A thumb mark affixed to a confession by an accused able to write his name is not a "signature" within the meaning of s. 3, cl. 52 of the General Clauses Act, or s 164 of the Criminal Procedure Code. SADANANDA PAL v. EMPEROR (1905). I. L. R. 32 Calc. 550

TITLE.

See BENGAL TENANCY ACT.

See CONFESSION . I. L. R. 32 Calc. 550

See JURISDICTION I. L. R. 32 Calc. 602

See LETTERS PATENT.

See LIS PENDENS . I. L. R. 32 Calc. 198

See SALE IN EXECUTION OF DECREE. I. L. R. 32 Calc.

TORT.

——— *Tort, committed by Government Official —Government, liability of—Principal and agent—Act XVIII of 1850—Second appeal—Suit of Small Cause Court nature—Small Cause Courts Act (IX of 1887), Sch II, Arts. 2 and 3—Civil Procedure Code (Act XIV of 1882), s 586*—A suit brought to recover moneys alleged to have been wrongly made over by a Magistrate purporting to act under the provisions of s 517 of the Criminal Procedure Code, does not fall within the second or the third exceptions to the second schedule of the Provincial Small Cause Courts Act. When the amount claimed fell short of Rs500, a second appeal was barred under s 586 of the Civil Procedure Code In cases of torts committed by Government officials, the person to be sued is the person, who has actually done the alleged wrongful act, and he may or may not have a statutory or other defence Where the act complained of was done by a Government official occupying such a position that for all practical purposes the Government had no control over him and the Government did not cause or authorise or adopt such act and gained no profit from it, the Government cannot be made liable *Hari Bhanji v. The Secretary of State for India in Council, I L R 4 Mad 344, Nobin Chunder Dey v The Secretary of State for India, I L R 1 Calc 11*, referred to MOTI LAL GHOSE v SECRETARY OF STATE FOR INDIA (1905)
9 C. W. N. 495

TRADE-MARK.

See CRIMINAL PROCEDURE CODE
I L. R. 29 Bom. 449

——— *False or counterfeit trade mark, use of—Penal Code (Act XLV of 1860), ss 482, 486 —Merchandise Marks Act (IV of 1889), s 6*—K, a merchant of Calcutta, ordered certain goods from Europe, but refused to take delivery of the consignment on its arrival in Calcutta. The goods were thereupon sold in the market with the labels of the firm of K attached thereto, and were purchased by M, a dealer in piece goods M sold the goods without removing the labels of K, and was convicted under s 486 of the Penal Code for selling the goods with a counterfeit trade-mark —*Held*, that no offence was committed by M, either under s 482 or s. 486 of the Penal Code MOTILAL PREMSUK v KANHAI LAL DASS (1905) . I. L. R. 32 Calc. 969

——— *Trade name—Secondary signification—Name indicating manufacturer—True description of article—Tendency to deceive—Injunction.*—The words "Camel Hair Belting" had acquired a special or secondary signification in the Indian market, meaning that the belting so called was of the plaintiffs' exclusive manufacture; the defendants began to sell belting made of camel hair, designating it as camel hair belting without clearly distinguishing it from the belting of the plaintiffs so as to be likely to mislead purchasers into the belief that it was the plaintiffs' belting endeavouring thus to pass off their goods as the plaintiffs'—*Held*, that the plaintiffs were entitled to an injunction restraining the defendants from using the words "Camel Hair" as

TRADE MARK—*concluded*

descriptive of, or in connection with, the belting made, sold, or offered for sale by them and not manufactured by the plaintiffs without clearly distinguishing such belting from the plaintiffs' belting *Reddaway v Banham (1896), A C 199*, followed. JOHN SMITH v F REDDAWAY & Co (1905)
I. L. R. 32 Calc. 401; s c. 9 C. W. N. 281

——— *User, bond fide dispute as to right of—Criminal proceedings propriety of—Penal Code (Act XLV of 1860), s 486*—In a prosecution for counterfeiting a trade mark, if the Magistrate is of opinion there is a *bond fide* dispute between the parties as to the right of user of such mark, he should not deal with the matter criminally, but leave it to the complainant to establish the right claimed in a Civil Court. *Emperor v Bakaullah Mallik, I L R 31 Calc 411*, referred to DOWLAT RAM v EMPEROR (1905) . . I. L. R. 32 Calc. 43

TRADE NAME

See TRADE MARK.

TRANSFER.

See CIVIL PROCEDURE CODE, s 241.
9 C. W. N. 134

See CRIMINAL PROCEDURE CODE

——— of non-transferable holding

See LANDLORD AND TENANT
9 C. W. N. 843, 895, 972

TRANSFER OF IMMOVEABLE PROPERTY.

——— *Registered deed of sale—Deed retained by vendor—Possession by vendor and subsequent transfer by registered trust deed to temple—Suit for possession by original vendee—Failure of consideration—Effect not given to intention to transfer—No property passed.*—S executed and registered what purported to be a sale deed in favour of first defendant. S retained the deed and also continued in possession of the property. He subsequently transferred the property to a temple, and held possession as tenant to the temple, until his death When S died, first defendant took possession of the property, whereupon plaintiffs, the Dharmakartas of the temple, brought the present suit to recover possession of it The finding was that the transfer by S to first defendant was intended to be effected only upon an event happening which did not in fact happen —*Held*, that, as the event did not take place, effect was not given to the intention to transfer and no property passed to the first defendant. RAMALINGA MUDALI v ANNADORAI NAINAR (1905) . . I. L. R. 28 Mad. 125

TRANSFER OF PROPERTY ACT (IV OF 1882)

——— s. 8

See MORTGAGE . 9 C. W. N. 710

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

——— s. 8—*Mortgage—Superior and subordinate rights existing in the same person—General words in mortgage-deed, effect of—Estoppel—Evidence Act (I of 1872), ss. 92, 115—Judgment nunc pro tunc.*—Defendant No. 1 amongst other properties mortgaged a taluk, in which he had a superior zamindari right and in some villages of which he had a subordinate *sarbarakari* interest. The mortgage deed did not in terms purport to pass the *sarbarakari* rights. But it is found that though the *sarbarakari* tenure was never allowed to be specially merged in the superior tenure, yet at the time the mortgage was created, it was not known that any *sarbarakari* interest existed in these villages, but both parties understood that the entire interest in the taluk without reservation of any *sarbarakari* rights passed under the mortgage. *Held* by PARGITER, *J.*—That it was not open to the mortgagor, on subsequently discovering that he had the *sarbarakari* rights in these villages, to say he had not mortgaged his entire interest in the villages, and that defendants Nos. 2 and 3, who were subsequent *bonâ fide* mortgagees for value of the *sarbarakari* interest, were in no better position. *Held by* WOODROFFE, *J.*—That according to the rule of construction embodied in s. 8 of the Transfer of Property Act, the general words used in the mortgage deed were, in the absence of reservation of entire rights, sufficient to pass the entire interest of the mortgagor. Appellant having died before the judgment was delivered, but after the appeal had been heard, the judgment was entered *nunc pro tunc.* GOUR CHANDRA GAJAPATI NARAIN DEB *v.* MAKUNDA DEB (1905) . . 9 C. W. N. 710

——— ss. 33, 52.

See SALE . . . 9 C. W. N. 22

——— s. 43.

See SALE . . . 9 C. W. N. 1019

——— ss. 52, 53.

See LIS PENDENS.

I. L. R. 32 Calc. 196

——— ss. 52, 53—*Estate under administration—Purchase from legatee or heir, effect of—Transfer of immoveable property in fraud of creditor—Lis pendens—Pleadings—Suit on mortgage—Sale in execution of mortgage-decree—Purchase of equity of redemption by mortgagee before sale—Validity of sale.*—When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition, which has been or may be made of the deceased's estate in due course of administration. An issue as to whether a transfer of immoveable property was fraudulent against a creditor within s. 53 of the Transfer of Property Act can be raised and decided only in a suit properly constituted for that purpose; and the present suit not having been so constituted either as to parties or otherwise, that question was not decided and decision given as in the case presented to the Court. *Malkarjun v. Narhari, 5 C. W. N. 10 : s.c. L.*

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

R. 27 I. A. 216, referred to. In a suit purporting to be brought on a mortgage, only a money-decree was made. It was pointed out that so long as that decree remained unreversed, the suit could not be regarded as one in which a right to immoveable property was "directly and specifically in question," within s. 52 of the Transfer of Property Act. By the time mortgaged properties were brought to sale in execution of a decree obtained on the mortgage, the equity of redemption had been purchased by the mortgagee himself in the name of a *benamidar,* so that at the time of sale the mortgagee alone was represented on each side of the record. The mortgagee himself became a purchaser at that sale. *Held,* that the sale under such circumstances passed no title to the mortgagee. CHUTTERPUT SINGH *v.* MAHARAJ BAHADOOR SINGH (1905).

9 C. W. N. 225
s.c. I. L. R. 32 Calc. 108
L. R. 32 I. A. 1

——— s. 53.

See MAHOMEDAN LAW.

I. L. R. 29 Bom. 428

——— ss. 54, 100—*Agreement to execute a mortgage over immoveable property—Charge—Deposit of title-deeds—Mortgage.*—Plaintiffs sued defendants for money lent and also claimed to be entitled to charge the debt on immoveable properties belonging to the defendants. Defendants had executed a document in which they recited that they had deposited the title-deeds of immoveable properties with the plaintiffs, and undertook to execute a deed of mortgage over those properties in favour of the plaintiffs, whenever the latter should call upon them to do so. This deposit had been made outside of the town of Madras, and the document had not been registered:—*Held,* that plaintiffs were not entitled to a charge on the immoveable property, but only to a personal decree. A deposit of title-deeds creates a mortgage and not a mere charge, under the Transfer of Property Act, and inasmuch as s. 59, paragraph (3), necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph, it follows that a grant of security by a mere deposit of title deeds unaccompanied by writing, duly attested and registered, evidencing it, is invalid, if it takes place outside of those towns. KONCHADI SHANBHOGUE *v.* SHIVA RAO (1905) I. L. R. 28 Mad. 54

——— s. 55.

See CIVIL PROCEDURE CODE, s. 111.

9 C. W. N. 178

——— s. 58.

See COSTS . 9 C. W. N. 372, 697

See MORTGAGE . 9 C. W. N. 1001

——— ss. 58, 59, 100—*Attestation, absence of—Charge*—Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*

the Act: *Held*, that it did not operate as a charge under s. 100 of the Act *Ram Kumari Bibi* v *Sri Nath Roy* 1 C W N 81, and the observations of BANERJEE, J., in *Tofal-udin Peada* v *Mubar Ali Shaha* I L R 26 Calc 78, approved PRAN NATH SARKAR v JADU NATH SAHA (1905)
I. L. R. 32 Calc 729
9 C. W. N 697

——— ss 58, 59, 100—*Simple mortgage—Transfer of interest—Charge—Attestation by one witness—Invalidity.*—A bond for the repayment of a debt contained the statement, "as collateral security for payment of the said money, I do mortgage 23 b ghas etc., etc." but there was no statement in it showing that there was any actual transfer of any interest *Held* (MACLEAN, C J, *dubitante*) that the bond amounted to a simple mortgage as defined in s 58 of the Transfer of Property Act and not to a charge merely as contemplated by s 100 of that Act Such a document can ot operate as a valid mortgage unless attested by at least two witnesses. NOBIN CHAND SARKAR v RAI KOOMAR SARKAR (1905) 9 C W N 1001

——— s 59

See MORTGAGE 9 C. W N 1001

——— ss 60, 83, 95—*Redemption of mortgage—Clog on equity of redemption—Parties to suit for redemption—Effect of payment of mortgage money into Court*—After the execution of a usufructuary mortgage the mortgagor executed a bond, which, in addition to the usual stipulation of re-payment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed, until the principal money and interest due under the bond had been paid off. *Held*, that such a provision amounted to a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption, which the law gave him, and was therefore a provision not to be enforced. *Shiv Shankar* v *Parma Mahton* I L R 26 *All* 559, followed. *Held* also that, where the purchaser of part of the equity of redemption comes into Court seeking to redeem the whole mortgage, and pays into Court the entire amount due at the time up n that mortgage, the *rights of a purchaser of another* portion of the equity of redemption claiming only to redeem his proportionate share in the mortgage cannot be dealt with in that suit, for upon payment by the plaintiff of the full amount due, the mortgage has ceased to exist. RUGHU SINGH v SAT NARAIN SINGH (1905) I. L. R. 27 All. 178

——— s 81—*Redemption clog on—Contract to pay off subsequent mortgages before redeeming prior mortgage—Validity—Contract to pay off an unsecured debt*—In a suit for redemption by a mortgagor the mortgagee set up by way of defence a contract entered into at the time of the execution of four bonds of later dates to the effect that the mortgage in suit was not to be redeemed without paying off the sums due under the subsequent bonds One of these bonds was a simple bond, the others mortgage bonds secured on the same property *Held* that, so far as these mortgage bonds were concerned, the contract was enforceable and must be given effect to, but as regards the simple bond the contract was a clog on the equity of redemption and was not enforceable DURGA PERSHAD v DUKHI RAY (1905) . . 9 C W N. 789

——— s 67

See COSTS . . 9 C. W. N. 372

——— ss. 67, 99

See EXECUTION OF DECREE
I. L. R. 32 Calc. 494

——— s 68—*Mortgage—Right of mortgagee to sue for mortgage money*—Where on the execution of a usufructuary mortgage the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage and this decree was subsequently put into execution, it was *held* that the mortgagee was entitled, under s. 68 (*c*) of the Transfer of Property Act, 1882, to sue the mortgagor for the mortgage-money The mortgage in question contained a covenant that, if any "khalal" occurred, the mortgagor would be responsible and would repay the mortgage money *Held* that the expression 'khalal' could not be confined to an unforeseen event or accident; but would include the consequences of conduct such as that of which the mortgagor had been guilty AHMAD UL LAH KHAN v SALAR BAKHSH (1905) . I. L. R 27 All. 488

——— s 72—*Mortgage—Prior and subsequent incumbrances—Rights of usufructuary mortgagee, who satisfies a decree on a prior mortgage of the property mortgaged to him—Held*, that a usufructuary mortgagee, who satisfies a decree for sale on a prior mortgage affecting the property mortgaged to him is entitled to retain possession until the amount so paid as well as the amount due in respect of his own mortgage has been realized. ABDUL QAYYUM v SAIF UD-DIN AHMAD (1905)
I. L. R. 27 All. 403

——— s 73

See MORTGAGE . 9 C W. N 989

——— s. 73—*Rent sale, with power to purchaser to annul incumbrances—Bengal Tenancy Act (VIII of 1885), s 167—Right of mortgagor to have his lien transferred to sale proceeds*—In the case of a rent sale (under the Bengal Tenancy Act) with express power to the purchaser to annul all incumbrances, so long as such power remains in the purchaser the lien of a mortgagee is in jeopardy In such a case the mortgagee may abandon his lien and ask to have it transferred to the surplus sale proceeds. *Prem Chand Pal* v *Purnima Dasi* I L. R 15 Calc. 546, referred to NIM CHAND BABOO v ASHUTOSH DUTT (1905) . 9 C W. N. 117

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

——— ss. 74 and 86.

See CIVIL PROCEDURE CODE.

——— s. 82—*Mortgage—Contribution—Valuation of properties for the purpose of ascertaining their liability to contribution.*—In estimating—for the purpose of giving effect to a claim for contribution—the respective values of two or more properties, the subject of a mortgage, the time to be regarded is the date of the execution of the mortgage in virtue of which contribution is claimed. MARDAN SINGH v. THAKUR SHEO DAYAL (1905).
I. L. R. 27 All. 549

——— s. 85.

See PRACTICE . I. L. R. 32 Calc. 748

——— s. 85—*Parties—Mortgage of mortgagee's rights—Suit by sub-mortgagee for sale of the interest of his mortgagor.—Held,* that in a suit by a sub-mortgagee to recover a debt secured by a mortgage of the defendant's rights as mortgagee the defendant's mortgagor is not a necessary party. In such a suit the plaintiff cannot bring to sale the mortgagee rights of the defendant. *Ganga Prasad* v. *Chunni Lal, I. L. R. 18 All. 118,* referred to. RAM JATAN RAI v. RAMHIT SINGH (1905).
I. L. R. 27 All. 511

——— s. 85—*Non-joinder of necessary parties—Civil Procedure Code, s. 32.*—Even if the non-joinder as a party defendant of a person who ought, in view of s. 85 of the Transfer of Property Act, 1882, to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit, such defect is cured, if the Court acting under s. 32 of the Code of Civil Procedure adds such person as a defendant. *Kali Charan* v. *Ahmad Shah Khan, I. L. R. 17 All. 48,* referred to. *Salig Ram* v. *Har Charan Lal, I. L. R. 12 All. 548,* considered. KUNDAN LAL v. FAQIR CHAND (1905).
I. L. R. 27 All. 75

——— s. 86—*Mortgage—Foreclosure—Prior and puisne incumbrancer—Transfer of Property Act (IV of 1882), ss. 74, 85, 86—Decree obtained by prior mortgagee against mortgagor—Payment by puisne mortgagee—Puisne mortgagee, rights acquired by—If enforcible in execution—Civil Procedure Code (Act XIV of 1882), s. 244—Separate suit when lies—Form of foreclosure decree—Proper form.*—A decree obtained by a prior mortgagee directed foreclosure in the event of the decretal amount not being paid into Court by the mortgagor within a specified time. The amount was paid by a puisne mortgagee, who was a party in the suit and was taken out by the decree-holder: *Held,* that under s. 74 of the Transfer of Property Act the puisne mortgagee acquired all the rights and powers of the prior mortgagee as such, but the rights so acquired were not such as could be worked out in execution of the decree made in favour of the prior mortgagee, that decree having been discharged by the payment. A separate suit to enforce those rights was not therefore barred by s. 244 of the Civil Procedure Code. The existence of a decree cannot, by the operation of s. 244 of the Civil Procedure Code, bar a fresh suit between the parties in respect of rights, which cannot be worked out without additions to the decree which the Court of Execution has no power to make. The form of order given in s. 86 of the Transfer of Property Act contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case. For the purpose of making decrees in which the rights of puisne incumbrancers to redeem would be recognised and provision made for the event of their being exercised, a form similar to that which obtains in the Chancery Division of the High Court in England might be found appropriate. GOPI NARAIN KHANNA v. BABU BANSIDHAR (1905) . . . 9 C. W. N. 577
s.c. L. R. 32 I., A. 123

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

——— ss. 86 and 87—*Mortgage—Suit for foreclosure—Appeal—Application for order absolute for foreclosure—Limitation—Execution of decree—Limitation Act (XV of 1877), Sch. II, Art. 178.*—The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages. On the 19th of June 1899 he obtained a decree, but it was in respect of three villages only. As to these the decree provided for foreclosure in default of payment by the defendants of a sum of R39,584-6-8 on or before the 19th of December 1899. The plaintiff did not ask for an order absolute for foreclosure in respect of this decree, but appealed against the dismissal of his suit as regards the two remaining villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage money was paid; and on the 15th of September 1903, the decree-holder applied under s. 87 of the Transfer of Property Act, 1882, for an order absolute for foreclosure. *Held,* that the decree-holder's application was not barred by limitation. The nature of proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. The decree-holder in this case could not have applied for an order absolute for foreclosure on the decree of the 19th of June 1899, without giving up his appeal from that decree. *Raham Haki Khan* v. *Ghasita, I. L. R. 20 All. 375,* and *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar, I. L. R. 16 Calc. 246,* referred to. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All 278,* discussed and doubted. *Mul Chand* v. *Mukta Pal, Weekly Notes, 1896, p. 100,* and *Mahabir Prasad* v. *Sital Singh, I. L. R. 19 All. 520,* referred to. SHAM SUNDAR v. MUHAMMAD IKTISHAM ALI (1905).
I. L. R. 27 All. 501

——— ss. 87, 89—*Foreclosure—Sale—Notice to mortgagee—Order absolute for sale.*—Where an order absolute has been made under s. 87 or s. 89 of the Transfer of Property Act without notice to the mortgagor, the Court has an inherent power to deal with an application to set aside the order made *ex parte* and can set it aside upon a proper case being substantiated. *Tarapada Ghose* v. *Kamini Dassi.*

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*

I L R 29 Calc 644 dissented from TASLIMAN v HARIHAR MAHTO (1905)
I. L. R. 33 Calc 253
s.c. 9 C. W. N. 81

——— s 88.

See CIVIL PROCEDURE CODE

———ss. 88 and 89—*Civil Procedure Code, s 235—Execution of decree—Limitation Act (XV of 1877), Sch II, Arts 179 and 179—Held*, that an application, framed as an application under s. 235 of the Code of Civil Procedure, for execution of a decree under s. 88 of the Transfer of Property Act, being in substance, though not in form, an application for an order *absolute* under *s. 89* of the Act, is an application for execution made in accordance with law, and as such will give a fresh starting point for limitation. *Oudh Behari Lal v Nageshar Lal I L R 13 All 278*, *Chunni Lal v Haraam Dass, I L. R 20 All 302*, *Ahmad Ali v Nazirun, I L. R 24 All 542*, and *Udit Narain v Jagannath, 1 All L J 15*, referred to. BALDEO PRASAD v IBN HAIDAR (1905)
I. L. R. 27 All 625

——— s 90

See LIMITATION ACT (XV OF 1877), SCH II, ART 179

——— s. 90—*Mortgage—Suit for sale—Premature suit decreed in part on confession of judgment by some of the defendants—Subsequent suit for balance of the mortgage debt*—In a usufructuary mortgage of a shop a separate dwelling house was hypothecated as collateral security. The dwelling house was subsequently sold to third parties. Before the expiry of the term of the mortgage the mortgagee brought a suit to recover the mortgage debt with interest, and the cost of certain repairs to the shop, by sale of both the shop and the dwelling house. This suit was decreed as against the representatives of the mortgagor, who confessed judgment, but dismissed as against the purchasers of the house as premature. After the expiry of the term of the mortgage, the plaintiff brought a second suit asking for sale of the dwelling house. *Held* that this second suit was not barred. The defendants purchasers, having formerly pleaded that the plaintiff's suit was premature, could not now plead that his present claim ought to have been included in it, and neither s 90 of the Transfer of Property Act, 1882, nor *s 244 of the Code of Civil Procedure* applied. GANGA RAM v HANRAIYA LAL (1905)
I. L. R. 27 All. 254

——— s 91 (b)—*Redemption of mortgage—Right of sub mortgagee to redeem a prior mortgage*—In 1884 *G* and others, the owners of the mortgaged property, executed a usufructuary mortgage in favour of *R D* and others to secure a principal sum of R349. In the mortgage it was provided that the property might be redeemed in *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one *B L* to secure a principal sum of R339. This mortgage contained a provision that the mortgagee should get possession of the property after redeeming the earlier mortgage of 1884. In the following month *B L* sub mortgaged the property in favour of *R S* and *M R* to secure a principal sum of R500. Of this sum, R349 15 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the mortgaged property; and in the deed the sub-mortgagor in express terms transferred his interest in the land, the subject matter of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietors of the mahal. *Held*, that the sub mortgagees from *B L* were entitled to redeem the prior mortgage of 1884. *Ganga Prasad v Channi Lall, I L. R 18 All 113* distinguished. *Misri Lal v Abdul Aziz Khan, Weekly Notes, 1901, p 139*, overruled. *Muthu Vijia Raghunatha Ramchandra Vacha Mahali Thurai v Venkatachallam Chetti, I L R 20 Mad 35*, and *Mata Din Kasodhan v Kazim Husain, I L. R 13 All 432*, referred to. RAM SUBHAG v NAR SINGH (1905)
I. L. R. 27 All. 472

———s. 99—*Civil Procedure Code, s 233—Mortgagee holding also a simple money decree against mortgagor—Transfer of decree—Rights of transferee*—*H*, the holder of a usufructuary mortgage over the property of *B*, obtained against *B* a simple money decree, which had nothing whatever to do with the mortgage or the debt secured thereby. *H* transferred this simple money decree to *M*. *Held*, that there was nothing to prevent *M* from bringing to sale in execution of this decree the property mortgaged by *B* to *H*. *Chundra Nath Dey v. Burroda Shoondury Ghose, I L R 22 Calc 813*, distinguished. BANK BAL v MANSI LAL (1905)
I. L. R. 27 All. 450

——— s. 99—*Mortgage—Sale of equity of redemption by mortgagor—Purchase of equity of redemption by mortgagee in execution of a decree against mortgagor's vendees—Effect of such purchase—Suit by mortgagor's vendees for redemption—Parties*—The equity of redemption in certain mortgaged property was sold by the mortgagor to third parties. In execution of a decree for costs and mesne profits the mortgagee brought the equity of redemption in the hands of the purchasers to sale and purchased it himself. Years after this the purchasers of the equity sued to redeem the mortgaged property, treating the sale to the mortgagee as a nullity. They did not implead in this suit the representatives of the original mortgagee. *Held*, that the suit must fail for want of proper parties. But in any case the *purchase by the mortgagee of the equity of redemption* was voidable only and not void, and could not after the lapse of some twenty years be impeached. *Tara Chand v Imdad Husain, I L. R 19 All 325*, and *Mayan Pathuti v Pakuran, I L. R 22 Mad 347*, approved. *Khairaj Mal v Dasm, L R 32 I A 23*; *Bhuggobutty Dossee v Shamachurn Bose, I L. R 1 Calc 337*; *Marland v*

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

Dhondo, I. L. R. 22 Bom. 624, and *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164,* referred to. ABDUL RASHID KHAN v. DILSUKH RAI (1905) . . . I. L. R. 27 All. 517

——— s. 100—*Mortgage decreé—Payment by one of several representatives of deceased mortgagor—Charge—Contribution.*—A mortgagee having obtained a decree on his mortgage the decretal amount was paid off by one of several representatives of the deceased mortgagor: *Held,* that the latter did not thereby acquire a charge on the mortgaged property, within the meaning of s. 100 of the Transfer of Property Act. The provisions of s. 95 and s. 82 of the Transfer of Property Act do not apply to such a case. *Bhagwandas* v. *Hardei, I. L. R. 26 All. 227,* disapproved. *Danappa* v. *Yamnappa, I. L. R. 26 Bom. 379,* distinguished. *Upendra* v. *Girindra, I. L. R. 25 Calc. 565,* referred to. JAHAN ARA BEGAM v. MIRZA SHUJAUDDIN BUKHT BAHADUR (1905) . . 9 C. W. N. 865

——— ss. 105, 106.

See LEASE . I. L. R. 32 Calc. 213

——— ss. 106, 116.

See NOTICE TO QUIT.
I. L. R. 32 Calc. 128

——— s. 107.

See REGISTRATION ACT (III of 1877), ss. 3 AND 17.

——— s. 107—*Lease of immoveable property—Kabuliat not a lease.*—Where a lease of immoveable property is for a period of more than one year, it must be made by means of a duly executed and registered patta; such a lease cannot be created by or proved by the production of a *kabuliat* only. *Nand Lal* v. *Hanuman Das, Weekly Notes, 1904, p. 46,* referred to. KASHI GIR v. JOGENDRO NATH GHOSE (1905) . . . I. L. R. 27 All. 136

——— s. 114—*Lease, forfeiture of, for non-payment of rent when period of grace allowed for payment.*—A Mulageni chit or permanent lease of 1866 for building purposes provided that the lessee should pay to the lessor a rent of R5 per annum by the 24th May of each year; and if any arrears remained due, they should be paid within a further period of three months or by the 24th August, and if not so paid, the Mulageni chit to stand cancelled. In a suit brought for cancelling the lease and recovering the demised premises on the ground amongst others that the rent due on the 24th May 1898 was not paid by the 24th August 1898:—*Held,* affirming the decree of the lower Appellate Court, that the condition of forfeiture for non-payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given. *Narayana Kamti* v. *Nandu Shetty, S. A. No. 89 of 1900 unreported,* referred to and followed. The provisions of the Transfer of Property Act do not apply to the lease. Even under s. 114 of the Transfer of Property Act, relief against forfeiture is discretionary and may depend on whether the lease allows a reasonable period of grace. NARAINA NAIKA v. VASUDEVA BHATTA (1905).
I. L. R. 28 Mad. 389

TRANSFER OF PROPERTY ACT (IV OF 1882)—*concluded.*

——— s. 116.

See BENGAL, NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT, s. 21 . . . 9 C. W. N. 705

See HOLDING OVER . 9 C. W. N. 340

TRESPASS.

See LIMITATION . 9 C. W. N. 111

See RIGHT OF SUIT . 9 C. W. N. 477

TRUST.

See ADMINISTRATION.
9 C. W. N. 239

See CIVIL PROCEDURE CODE.

See MAHOMEDAN LAW . 9 C. W. N. 625

See MORTGAGE . . 9 C. W. N. 914

——— *Indenture—Construction of indenture—"Absolutely," interpretation of—Construction of deeds—Construction of wills—Repugnancy in words*—A deed of indenture contained, among other things, a provision which ran: "upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit." On a construction of this provision:—*Held,* that having regard to the words that follow the phrase in the indenture in question, the word "absolutely" cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the events, which had happened. The rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE GENERAL OF BOMBAY v. HORMUSJI (1905) . . . . I. L. R. 29 Bom. 375

——— *Charitable Trust—Trustee of, has no power to appoint a co-trustee in place of a deceased trustee—Civil Procedure Code (Act XIV of 1882), s. 13—Decision on a question of law not res judicata when the subject matter of the subsequent suit is different.*—The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of a power under the instrument creating a trust or by virtue of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him. A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties, when the subject matter of the two suits are different. *Quære.*—Whether such a decision can be *res judicata* against a party, who could not have prosecuted an appeal against it. *Parthasaradi* v.

TRUSTEE—*concluded.*

right of indemnity—Equitable right of creditor—Liability of trust estate—Nonjoinder of c.q.t.'s, if bar to liability of trust estate.—Unless a trustee loses his right of indemnity through neglect or default, he is entitled to be indemnified out of the trust estate for all debts incurred for the benefit of the trust estate, and on failure by him to pay such debts, creditors are entitled to stand in his shoes. *In re Shard, I. L. R. 28 Calc. 574*, referred to. Plaintiffs obtained a personal decree for a certain sum against a trustee, in a suit brought by them against the trustee for balance due for goods supplied to the trust estate, which consisted of a business. The trust settled the net profits on the settlor for life with a reversion to her sons, born or to be born. At the time of the suit, a son of the settlor was alive, but was not made a party to the suit. Subsequently the plaintiffs on proof that the debt incurred from them by the trustee was for the benefit of the trust estate and that there had been no neglect or default by the trustee so as to deprive him of his right of indemnity, moved to obtain an order that on the trustee's failure to pay the decretal amount they were entitled to execute their said decree against the trust estate. Notice of their application was given to the son, who did not appeal. *Held*, that on default of the trustee's paying the decretal amount, the plaintiffs were entitled to execute their decree against the trust estate. MADDEN *v.* ALFRED JOHN BRIDGE (1905) . 9 C. W. N. 9

TRUSTEES ACT (XXVII OF 1866).

——— s. 30—*The Trustees and Mortgagees Act (XXVIII of 1866)—Hindu trusts, if acts applicable to—"Cases in which English law is applicable" in s. 3, meaning of.*—The Indian Trustees Act is applicable to a trust which has been created in a form valid under the English law, but in which the trustees and the *cestui que trustent* are all Hindus, if such trust does not violate the provisions of Hindu law. IN THE MATTER OF NILMONEY DEY SARKAR (1905) . 9 C. W. N. 79
s.c. I. L. R. 32 Calc. 143

TRUSTEES AND MORTGAGEES ACT (XXVIII OF 1866).

See TRUSTEES ACT, s. 30. 9 C. W. N. 79

TRUSTS ACT (II OF 1882).

See ADMINISTRATOR GENERAL'S ACT (V OF 1902).

——— s. 6—*Hindu Law—Ancestral property—Trust by the father—Will—Legatees*—Certain legacies were devised by the will to relatives of the testator and others. *Held*, that as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI *v.* BAI MANI (1905). I. L. R. 29 Bom. 351

TRUSTS ACT (II OF 1882)—*concluded.*

——— s. 30—*Executor—Failure to produce fund at appointed time—Advisory duty—Appointment of an agent—Degree of care in the appointment—Want of diligence—Breach of duty—Loss caused to the estate—Liability of executor.*—When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie*, they are liable for the loss which thereby accrues. One, who undertakes a duty, is bound to know what his duty requires. Where a testator by his will committed the management of the property to his widow along with two out of the five executors including the widow, it is not open to one of the executors, who was not specifically entrusted with the management, to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many, that votes of the majority of the executors governed, and that the real management was entrusted to two of the executors in co-operation with the widow. In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and supervision of the agent, and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss must fall on the executor. The indemnity clause of s. 30 of the Trusts Act (II of 1882) casts the onus of proof on those, who seek to charge a trustee with loss arising from the default of an agent, when the propriety of employing an agent has been established. But where there is a clear breach of duty in the employment and supervision of the agent the liability of the trustee for breach of trust arises. LAKHMICHAND *v.* JAI KUVARBAI (1905) . I. L. R. 29 Bom. 170

——— s. 74—*Administrator General's Act (V of 1902), s. 4, cl. 2—Discharge by Court of an executor—Vesting of property in the continuing executor.*—The Court has power to discharge an executor on his own application, if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor—it only relieves him from the duties of his office from the date of the discharge. EX PARTE AMERCHAND MADHOWJI (1905). I. L. R. 29 Bom. 188

——— s. 82.

See HINDU LAW, WILL I. L. R. 29 Bom. 306

U

ULTRA VIRES.

See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF . I. L. R. 32 Calc. 1107

See FOREST ACT (VII OF 1871).

——— *Nullity—Executive Government.*—An order, which is entirely *ultra vires*, of the Executive

ULTRA VIRES—*concluded*

Government is a mere nullity and no suit is necessary to set it aside BALVANT RAMCHANDRA v SECRETARY OF STATE (1905) . I. L. R. 29 Bom. 480

UNCHASTITY.

See HINDU LAW
I. L. R. 32 Calc. 871
9 C. W. N. 1003

See SLANDER . 8 C. W. N. 847

UNITED PROVINCES LAND REVENUE ACT (III OF 1901)

——— ss. 58 and 86—*Cess—Rent—Payment recorded in wajib-ul-arz as muktafisa—Held*, that certain dues recorded as payable to the zamindars by a class of residents in the *abadi* other than agricultural tenants, and described in the village wajib-ul-arz as "*muktafisa*," were payments to be made by way of rent, and not cesses such as required the general or special sanction of the Local Government for their validation. ABDUL HAI v NATHU (1905) . I. L. R. 27 All. 183

USAGE OF TRADE.

See PRINCIPAL AND AGENT
I. L. R. 29 Bom. 231

USUFRUCT.

See EASEMENTS ACT

See RIPARIAN OWNERS

USUFRUCTUARY MORTGAGE.

See MORTGAGE

See PLEADINGS.

V

VAKIL

——— *Vakil's fee—Regulation II of 1827, s 52—Calculation according to the actual value of the property in suit*—A vakil's fee should be calculated on the amount of the actual value of the property, the subject-matter of the suit, and not on the amount of the claim as estimated for the purposes of the payment of Court fees. *Per* JENKINS *C J*—"The principle and rule of taxation ought (in our opinion) as far as possible to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court and this can best be secured by adopting the actual value as the basis of taxation." The real as well as the Court-fee value should be stated on every plaint and memorandum of appeal, and in case of dispute an issue should be raised as to the real value. BAI MEHERBAI v MAGANCHAND (1905) . I. L. R. 29 Bom. 229

VALUATION OF LAND.

——— *Compensation, determination of—Land Acquisition Act (I of 1894)—Market value of land—Future utility—Expert opinion*—In estimating the value of land acquired by Government, the future utility of the land is a consideration which ought to be taken into account; such future utility, however, must be estimated by prudent business calculations and not by mere speculation. The advantage of expert opinion regarding the value of land (especially in or near large towns) explained. Enquiry cannot be dispensed with. A proper valuation cannot be made simply by visiting the land and picking up orally some casual and untested information, which may be interested or one sided. RAJENDRA NATH BANERJEE v THE SECRETARY OF STATE FOR INDIA (1905) . I. L. R. 32 Calc. 343

VALUATION OF SUIT.

See CIVIL PROCEDURE CODE ss 54 237
I. L. R. 27 All. 411, 440

See JURISDICTION
I. L. R. 32 Calc 734

VENDOR AND PURCHASER.

——— *Suit by person out of possession, but entitled to possession—Hindu Law—Champerty and maintenance—Deed of sale of share in taluk in consideration of funds for suit to recover it—Public policy—Evidence of adoption*—In order to provide funds to prosecute his claim to the Birwa Mehnon taluk a deed of sale, in favour of the respondent, of a moiety of the taluk was in 1898 executed, whilst out of possession by a person, who (if the adoption as successor to the Mankapur Raj of the head of a senior branch of the family in 1831 were proved) was entitled to succeed to the taluk as being the son of the collateral, who was the nearest heir when the succession opened out in 1879 on the death of the daughter of the original taluk lar, whose husband, the appellant, then obtained possession. The taluk was one in lists 1 and 2 under Act I of 1869 and devolved on a single heir, though not descending by the rules of lineal primogeniture. The respondent as co-plaintiff with his vendor brought a suit against the appellant to recover possession of the taluk. The vendor entered into a compromise and withdrew from the suit, which was prosecuted by the respondent alone. The validity of the deed of sale was impeached by the appellant on the ground that it was champertous and contrary to public policy, it being contended that the suit was therefore not maintainable. *Held*, by the Judicial Committee (affirming the decision of the Court of the Judicial Commissioners of Oudh) that the transaction was a present transfer by the vendor of a moiety of his interest, in the taluk giving a good title to the respondent, on which it was competent to him to sue. The vendor could not have prosecuted his claim to the estate without assistance; there was nothing extortionate or unreasonable in the terms of the bargain, no gambling in litigation, and nothing contrary to public policy. *Held* also, with regard to the

VENDOR AND PURCHASER—*concluded.*

adoption, that notwithstanding it took place so long ago that it was impossible to prove that all requisite ceremonies were duly and regularly performed, and although no change of *gotra* occurred, evidence in favour of the adoption preponderated: a body of strong and persistent tradition preserved in the *wajib-ul-arz* of the Mankapur Raj and recorded in the Oudh Gazetteer and Gonda Settlement Report was in favour of it; it had been supported by the appellant in former litigation, and no claim to the Birwa Mehnon taluk had ever been set up by any member of the Mankapur family, with which the adoption had been made. The decision of the Judicial Commissioner's Court upholding the adoption was therefore affirmed. ACHAL RAM *v.* KAZIM HUSAIN KHAN (1905) . I. L. R. 27 All. 271
s.c. 9 C. W. N. 477

W

WAGERING.

——— and gaming transaction.

See EVIDENCE ACT, s. 92.
9 C. W. N. 355

WAGERING CONTRACTS.

See CIVIL PROCEDURE CODE, s. 111.
9 C. W. N. 178

See EVIDENCE ACT,
I. L. R. 32 Calc. 437

——— *Principal and agent - Sale and purchase by the agent on his own account—Usage of trade—Commission agents—Pakki adat system—Tender of evidence as to delivery at other vaidas—Relevancy of such evidence.*—The defendant, a resident of the North-West Provinces, from time to time sent orders to the plaintiffs in Bombay to sell and purchase cotton on his account. The plaintiffs carried out the defendant's orders as they were received. Up to the due date they had purchased on behalf of the defendant 400 bales more than they had sold. It appeared that by reason of other contracts entered into with the merchants from whom they had purchased on behalf of the defendant, the plaintiffs had 'cancelled' all these purchases, before the due date. The defendant neither sent money to pay for the cotton nor did he direct the plaintiffs to sell on his behalf. The plaintiffs sued the defendant describing themselves as commission agents for their commission and for the loss on 400 bales sold on defendant's account. The plaintiffs were unable to show that they had paid any damages on account of the defendant, for failure to take delivery, to any of the merchants from whom they had purchased on defendant's account. The suit was dismissed in the lower Court on the ground that the contracts were wagering contracts. In appeal the plaintiffs contended that they were entitled as between themselves and the defendant to treat themselves as the principals, on the ground that the business was conducted on the *pakki adat* system, under which no privity was established between the defendant and the merchants to whom or from whom cotton was sold or

WAGERING CONTRACTS—*concluded.*

bought on his account. *Held*, that if the plaintiffs were, as their plaint stated, commission agents, and they were employed by the defendant as his commission agents, and as such, under instructions and on account of the defendant, entered into these purchases, they had no cause of action. *Held*, further, that the usage termed the *pakki adat* system involved a material departure from the ordinary relations between a principal and his agent of which there was no suggestion in the pleadings or issues, nor was there any evidence to prove it. The plaintiffs must therefore be held to the case they had made. During the course of the hearing in the lower Court it appeared that at the *vaida* for which the contracts in question had been made the plaintiffs had neither given nor taken delivery of any cotton. They tendered evidence to show that at other *vaidas* they had given or taken delivery of cotton and other goods. The learned Judge rejected the evidence as irrelevant to the issue whether the contracts were wagering contracts. *Held*, on appeal, that the evidence tendered was relevant and should have been admitted. CHANDULAL SUKLAL *v.* SIDHRUTHRAI (1905).
I. L. R. 29 Bom. 291

WAIVER.

See MUNICIPALITY . I. L. R. 29 Bom. 35

WAJIB-UL-ARZ.

See LANDLORD AND TENANT.
I. L. R. 27 All. 338, 356

See PRE-EMPTION.
I. L. R. 27 All. 12, 457, 553, 602

WAKF.

See MAHOMEDAN LAW . 9 C. W. N. 625
I. L. R. 27 All. 320

WAKF PROPERTY.

See LIMITATION. I. L. R. 32 Calc. 537

See RIGHT OF SUIT.
I. L. R. 32 Calc. 273

WARG LAND.

See "SOUTH CANARA."

WATER RIGHTS.

See RIPARIAN OWNERS.

WIDOW.

See HINDU LAW I. L. R. 29 Bom. 346
9 C. W. N. 651

See KHOJA MAHOMEDANS.
I. L. R. 29 Bom. 85

——— *Hindu Law—Remarriage—Death of the son by first husband—Succession to the son.*—A remarried Hindu widow is entitled to succeed to

WIDOW—*concluded*

the property left by her son by her first husband, the son having died after the remarriage *Akora Suth v Boreani, 2 B L. R 199* followed. BASSAPA v. RADAVA (1905) . . I. L. R. 29 Bom. 91

WILL.

	Col.
1. CONSTRUCTION OF WILL . . .	359
2. EXECUTION OF WILL . . .	360
3 PRACTICE	361
4. PROBATE	362

See HINDU LAW 9 C. W. N. 1033

See HINDU LAW, WILL.
I. L. R. 32 Calc 881, 882, 1051
9 C. W. N. 528

See MAHOMEDAN LAW,
I. L. R. 29 Bom. 267

See PROBATE I. L. R. 32 Calc. 1082

See PROBATE AND ADMINISTRATION ACT, s 50 . . 9 C. W. N. 100

1. CONSTRUCTION OF WILL.

———— *Construction of will—Conditional bequest—Condition that legatees should "humbly apply for subsistence"—Condition precedent—Application made by letters not in substance or spirit "humble requests"—Hindu Law—Void bequest—Attempt to create perpetuity—Legacy for "as long as there are male heirs"*.—To his brother the father of the respondent, and another relative, by both of whom a suit against him was then pending for partition of his zamindari, the father of the appellant in his will made a bequest, not as a duty, but as an *act of grace, on the condition that*, "should this suit which is brought by them under an illusion be disposed of against them, and should they after the final Court's decision humbly apply for subsistence," they should *receive a certain allowance* from land to be purchased for the purpose of maintaining them to be "enjoyed as long as there are male heirs and then revert to the zamin"—*Held*, by the Judicial Committee, that this condition was not complied with by a letter from the respondent's father to the Collector of the district, who was administering the estate, not containing any language of humility, but asserting the zamindar's duty to maintain the applicant and demanding a sum considerably larger than that given by the will; nor by another letter from the respondent to the Collector protesting against the inadequacy of the bequest, and demanding "something suitable to our dignity," the letters neither in substance or spirit evidencing a humble request for subsistence in the sense of the will In this view it *was held necessary* to decide a contention that the bequest was void as coming within the prohibition laid down in the Tagore case *I R I A Sup Vol 47; 9 B L R 377* VATTIANADHA RAJU v. CHAMAYYA RAJU GARU (1905) I. L. R. . . . L. R. . .

WILL—*continued*

1. CONSTRUCTION OF WILL—*continued*

———— *Will—Genuineness—Procedure to be followed in deciding—Consideration of contents of should precede proof of execution*.—A Judge concluded that a Will was a forgery primarily from a consideration of its contents, which he thought to be so extraordinary as to overbalance altogether the evidence of witnesses, who spoke to having been present and seen the testator sign the Will and to having themselves signed the Will as witnesses. *Held*, that the method of procedure adopted was erroneous It was not permissible to the Judge first to make up his mind about the contents of the Will and then look at the positive evidence in favour of its execution from that standpoint. BRIJ KUNWAR v. MUSSAMMAT BHAGIRATHI (1905).
9 C. W. N. 819

———— *Repugnancy in words—Construction of deeds—Indenture—Construction of indenture—"Absolutely," interpretation of—Held*, that the rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE GENERAL OF BOMBAY v. BOMMAJI (1905).
I. L. R. 29 Bom. 375

———— *Will—Suit for cancellation of will brought during the life time of the testator*.—*Held*, that no suit for the cancellation of a will can lie in the life time of the testator RAMSAHAI KUNWAR v GURCHARAN KUNWAR (1905)
I. L. R. 27 All. 14

2. EXECUTION OF WILL.

———— *Will—Execution proof of—Probate, delay in taking—Probate taken on necessity arising—Revocation, application for, made after the death of persons competent to give best evidence—Probate and Administration Act (V of 1881), s 50*.—*K* died leaving an infant son, a daughter and a widow and some property of very trifling value. The son claimed to be heir through his mother to a large estate and this claim was then under litigation. The son died 5 years after *K's* death having shortly before obtained a decree for the said estate. The widow thereupon adopted *K's* brother's son, and then proved in common form a will purporting to be *K's*, which contained provisions for the prosecution of his son's claim under litigation, and directed his widow to adopt *K's* brother's son should his son die, provisions being also made for his daughter out of his estate On an application made 22 years later on behalf of *K's* daughter's son for revocation of the probate, the High Court held the terms of the Will to be reasonable and the evidence sufficient to establish the Will considering the difficulty of establishing a Will so long after its execution, the persons who would be expected to give the best evidence in the matter having died The Judicial Committee affirmed that . . . pointed out that the delay in taking . . . was accounted for by the fact that, until the adoption in his place, there

WILL—*continued.*

2. EXECUTION OF WILL—*concluded.*

was no very urgent necessity for taking out probate, *K's* estate being of itself of trifling value. KALI DAS CHUCKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY (1905) . . . 9 C. W. N. 49

——— *Will—Execution—Solicitor-executor preparing and attesting Will—Clause permitting him to charge for professional and other services—Proof—Onus—Independent advice—Fiduciary relation—Deed referred to in Will—Probate—Succession Act (X of 1865), s. 51.*—If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true Will of the deceased. *Barry* v. *Butlin, 2 Moore P. C. 480 (1838),* and *Fulton* v. *Andrew, L. R. 7 E. & I. Ap. 448 (1875),* approved. But there is no rule of law as to the particular kind or description of evidence, by which the Court must be satisfied. The degree of suspicion excited and the weight of burden of removing it must depend largely on the nature and amount of the benefit taken and all the circumstances of the case. The question is a pure question of fact and one to be decided on consideration of the whole of the evidence and the circumstances of the case. A clause in the Will in this case permitted the solicitor, who prepared and attested the Will and was also appointed one of the executors, to charge for professional services done by him or his firm. It also allowed him a further remuneration of one per cent. on the profits of the testator's business, for services in connection with the management of the business. The Judicial Committee was satisfied that there were circumstances which showed that the testator understood and approved of the clause, although it appeared that the testator had no independent advice in this matter and no independent evidence was adduced that this clause in particular was called to the testator's attention. Where a deed-poll previously executed by the testator was referred to in the Will, but not for the purpose of making its contents a part of the Will: *Held,* that it was not a testamentary document requiring probate, although the Will in terms purported to confirm the deed. BAI GUNGABAI *v.* BHUGWANDAS VALJI (1905).

9 C. W. N. 769

3. PRACTICE.

——— *Practice—Civil Administration—Further directions—Advocate General, by consent, added as party—Right to question validity of legacies—Estoppel—Laches—Stale demand—Khoja Mahomedan Will—Gift to a class—Construction.*—*M,* a Khoja Mahomedan, died in 1864. By his will and codicil he left his property to trustees, upon trust, *inter alia,* to pay his daughter *L,* a monthly sum during her life and, after her death,

WILL—*continued.*

3. PRACTICE—*concluded.*

to pay it to her children. *M's* residuary estate was charged in favour of certain charitable objects. In 1868 the Advocate General commenced a suit (962 of 1868) for the administration of *M's* estate. In 1869 *L* died, leaving four children surviving her. In 1871 a decree for the administration of *M's* estate was granted to *R,* the husband of *L,* in another suit (370 of 1870). In 1873 a decree for administration was passed in the Advocate General's suit (962 of 1868). By the decree the Advocate General was given liberty to join in taking the accounts and making the enquiries directed in suit 370 of 1870. In 1899 the Commissioner made his final report in suit 370 of 1870, to which, however, exceptions were filed. In 1902 the case came before TYABJI, *J.,* for further directions. Up to this date the validity of the gift to *L's* children had not been questioned by the parties and the Commissioner's report was based on the assumption that it was valid. The Advocate General was now, by consent of the parties, joined as a co-defendant, to simplify and regularize the suit. He thereupon contended that the gift to *L's* children was bad as transgressing the rule laid down in the Tagore case and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The Division Court ruled that the Advocate General was not entitled at this stage to raise the point. *Held* (reversing TYABJI, *J.*), that the Advocate General was not precluded, even at this stage, from questioning the validity of the gift to *L's* children. Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit, wherein they are adopted. A beneficiary is generally taken as sufficiently represented by his trustees: but this does not hold good, where the contest lies between the beneficiaries themselves. *Held,* on further hearing, on the construction of the will, that such of *L's* children as were in existence at the death of the testator were entitled to the annuity at *L's* death. ADVOCATE GENERAL *v* KARMALI (1905) . . I. L. R. 29 Bom. 133

4. PROBATE.

——— *Probate and Administration Act (V of 1881)—Will—Document by a shebait appointing another shebait.*—Where the *shebait* of an endowed property executed a document appointing another person as a *shebait* for the purpose of carrying out the *sheba* and other rites after the death of the former: *Held,* that it was not a Will and probate of such a document could not be applied for. CHAITANYA GOBINDA PUJARI ADHICARI *v.* DAYAL GOBINDA ADHICARI (1905) . . . 9 C. W. N. 1021
s.c. I. L. R. 32 Calc. 1032

———*Probate—Deed-poll executed at same time as will and referred to in it—Will giving benefit to solicitor, who prepared it—Onus of proof—Testamentary writing—Succession Act (X of 1865), s. 51.*—A will made reference to a deed-poll

WILL—*concluded*

4. PROBATE—*concluded*.

which was executed at the same time, and also contained clauses under which the solicitor, who prepared it, took some benefit, and was appointed an executor of the will, and a trustee of the testator's estate. The first Court granted probate of the whole will, but the High Court on appeal varied that order by directing that the passage referring to the deed poll and that giving remuneration to the solicitor *should be omitted in the grant of probate*. *Held*, by the Judicial Committee, that the *onus was on the* solicitor to show that the deed poll and the disputed parts of the will expressed the true intention of the testator, who understood and approved of them, and that on the evidence and under the circumstances of the case he had discharged that onus. The law relating to the case of a person taking a benefit under a will prepared by himself as laid down by Lord Wensleydale in *Barry v Butlin*, 2 *Moo P C 480*, and approved of in *Fulton v Andrew*, *L. R 7 H. L 448*, followed. *Held*, also, that the deed poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making, or so as to make, its contents part of the will; it was, therefore, not within s. 81 of the Succession Act (X of 1865). BAI GAVARBAI v. BHAGWANDAS LALJI (1905).

I. L. R. 29 Bom. 530

WITNESSES.

See EVIDENCE I. L. R. 32 Calc. 54
9 C. W. N. 142

See EVIDENCE ACT.

See MORTGAGE 9 C. W. N. 1001

See PENAL CODE, ss. 211, 193, etc.
9 C. W. N. 142, 483, 621

See TRANSFER OF PROPERTY ACT, s. 59
9 C. W. N. 697

WITNESSES—*concluded*.

——— *Process—Magistrate—Extraordinary jurisdiction of the High Court—Prejudice—Criminal Procedure Code (Act V of 1898), s 145—Charter Act (24 and 25 Vict., c 104), s 15.*—It is not obligatory on a Magistrate to assist parties to a proceeding under s. 145 of the Criminal Procedure Code in producing their witnesses, and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence. *Harendra Narain Singh v Bhoban Pros Baruani, I L R 11 Calc 763; Ram Chandra Das v Monohar Roy, I L R 21 Calc 29, Madhab Chandra Tanti v Martin, I L R 30 Calc 608 note; Surja Kanta Acharjee v Hem Chandra Chowdhury, I L R 30 Calc.* 503, and *Radhanath Singh v Mangal Goren, 2 C L J 286 note*, dissented from. *Manmatha Nath Mitter v Barada Prasad Roy, I L R 31 Calc 635*, referred to. The powers of superintendence under s. 15 of the Charter Act should, in cases under s. 145 of the Criminal Procedure Code, be exercised with caution; and the Court ought not to interfere, unless satisfied that the party has been prejudiced by the proceedings in the Court below. *Sahi Lal Sahi v Tara Chand Ta, 9 C. W. N. 1025*, followed. Where a party had obtained summonses upon his witnesses, and on the failure of some of them to appear, applied for fresh summonses against them, which the Magistrate refused, and where it was further alleged that he had refused to allow a witness to prove certain documents. *Held*, that there was nothing to show that the absent witnesses could not have been made to attend without the assistance of the Court, nor whether they were material witnesses, nor that any questions were put to the witness, which were improperly disallowed, and that the party was not, therefore, shown to have been prejudiced. TARA PADA BISWAS v. NOBIN ERA [illegible] (1905) . . I. L. R. 32 Calc 1093

WILL—*concluded*

4. PROBATE—*concluded*

which was executed at the same time and also contained clauses under which the solicitor who prepared it took some benefit, and was appointed an executor of the will, and a trustee of the testator's estate. The first Court granted probate of the whole will, but the High Court on appeal varied that order by directing that the passage referring to the deed poll and that giving remuneration to the solicitor should be omitted in the grant of probate. *Held* by the Judicial Committee that the onus was on the solicitor to show that the deed poll and the disputed parts of the will expressed the true intention of the testator who understood and approved of them, and that on the evidence and under the circumstances of the case he had discharged that *onus*. The law relating to the case of a person taking a benefit under a will prepared by himself as laid down by Lord Wensleydale in *Barry* v *Butlin* 2 *Moo P C* 480 and approved of in *Fulton* v *Andrew* *L R* 7 *H L* 448 followed. *Held* also, that the deed poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making or so as to make its contents part of the will; it was therefore not within s 51 of the Succession Act (X of 1865). BAI GANGABAI v BHUGWANDAS VALJI (1905) I L R 29 Bom. 530

WITNESSES

See EVIDENCE I L R 33 Calc 64
9 C W N 181

See EVIDENCE ACT

See MORTGAGE 9 C W N 1001

See PENAL CODE ss 191 193 cl. (2) 9 C W N 127 433 911

See TRANSFER OF PROPERTY ACT s 59 9 C W N 697

WITNESSES—*concluded*

——— *Process—Magistrate—Extraordinary jurisdiction of the High Court—Prejudice—Criminal Procedure Code (Act V of 1898) s 145—Charter Act (24 and 25 Vict., c 104) s 15.*—It is not obligatory on a Magistrate to issue at parties to a proceeding under s. 145 of the Criminal Procedure Code in producing their witnesses and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence *Harendra Nara n Singh* v *Bhobani Pres Barua* I L R 11 Calc 762; *Ram Chandra Das* v *Monohar Roy* I L R 21 Calc 29; *Madhab Chandra Tant* v *Mati n* I L R 30 Calc 508 note; *Surja Kanta Acharjee* v *Hem Chandra Chowdhury* I L R 30 Calc 508 and *Radhanath Singh* v *Mangal Gareri*, 2 C L J 286 note dissented from. *Manmatha Nath Mitter* v *Baroda Prasad Roy* I L R 31 Calc 635 referred to. The powers of superintendence under s. 15 of the Charter Act should in cases under s. 145 of the Criminal Procedure Code be exercised with caution and the Court ought *not to interfere* unless satisfied that the party has been prejudiced by the proceedings in the Court below *Sukh Lal Sahi* v *Tara Chand Ta* 9 C W N 1010 followed. Where a party had obtained summonses upon his witnesses, and on the failure of some of them to appear applied for fresh summonses against them which the Magistrate refused and where it was further alleged that he had refused to allow a witness to prove certain documents *Held* that there was nothing to show that the absent witnesses could not have been made to attend without the assistance of the Court nor whether they were material witnesses, nor that any questions were put to the witness which were improperly disallowed, and that the party was not, therefore shown to have been prejudiced. TARA DASI DASSIA v NURUL HUQ (1905) I L R 32 Calc 1093

C I C P O—No 80 L D—3 10-07.—1,000—P M M

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

had the order been passed in execution proceedings under a decree duly passed *Harris's Chunder Choudry* v *Kali Sundari Debia*, I. L. R. 10 I. A. 4, and *Abdul Rahiman Saheb* v *Gangapathi Bhatta*, I. L. R. 23 *Mad* 517, followed. Such an application is not an application of the description contemplated by Art 179. LAKSHMANAN CHETTY v RAMANATHAN CHETTY (1905).
I. L. R. 28 Mad. 127

——— s. 244—*Auction sale reversal of—Refund of purchase money, suit for*—The right of an auction purchaser to a refund of the purchase-money where the auction-sale has been set aside for irregularity, is not a question arising between the parties to the suit or their representatives and relating to the decree, within the meaning of s. 244 (c) of the Civil Procedure Code a separate suit for refund of such purchase-money is therefore maintainable. JOTINDRA MOHUN TAGORE v MAHOMED BASIR CHOWDHRY (1905)
I. L. R. 32 Calc 332

——— s. 245, cl. (c)—*Mortgage—Decree for sale—Jurisdiction.*—A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings, to the property being sold on the ground that it was not the property of the mortgagor S. 244 (c) of the Civil Procedure Code does not apply to a case, where the judgment-debtor tries to set aside the effect of a decree *Sawal Das* v *Bimilla Begam* I. L. R. 13 All. 490, *Lilladhar* v *Chaturbhuj*, I. L. R. 21 *All* 277; and *Hiralal Saha* v *Parmeshwar Rai*, I. L. R. 21 *All* 356, followed. *Ram Chandra Mukerjee* v *Banyi Singh* I. L. R. 27 *Calc* 243, distinguished. KHETRAPAL SINGH ROY v SHYAMA PROSAD BARMAN (1905)
I. L. R. 32 Calc 285

——— ss. 244, 545—*Execution of decree—Order refusing stay—Appeal—Deliberate exercise of discretion by lower Court*—An order refusing to stay execution of a decree under s. 545 of the Civil Procedure Code (Act XIV of 1882), is not appealable *Yusuf Abdullah* v *Damodardas*, I. L. R. 22 *Bom* 279, doubted. Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. RAMCHANDRA v BALMUKUND (1905)
I. L. R. 29 Bom. 71

——— s. 253—*Decree—Execution—Surety—Notice to the surety—Court executing the decree can give the notice*—The intention of s. 253 of the Civil Procedure Code (Act XIV of 1882) is that, when a person has made himself liable as a surety for the performance of a decree passed against another, he must have notice in writing that the decree is going to be executed against him. It is immaterial whether such notice is given by the Court which passes the decree or the Court to which it is sent for execution. LAKSHMISHANKAR v BAGHUMAL (1905)
I. L. R. 29 Bom 29

——— s. 257A—*Agreement to give time on condition of payment of higher rate of interest—Sanction of Court not accorded—Non extinction of judgment-debt—Separate suit to recover enhanced interest, maintainability of*—It is only when the judgment debt is extinguished and a new contract made that an agreement giving time for the satisfaction of the judgment debt, not sanctioned by the Court can be enforced. Where, therefore, the judgment debtors filed an application before the Court executing the decree for a postponement of the sale, as they had agreed to pay interest at a rate higher than the decretal rate but the sanction of the Court was not accorded to such payment *Held*, that as the agreement contained in the petition did not put an end to the plaintiff's claim on their previous decree and substitute something else in its place, it was void under s. 257A of the Civil Procedure Code, and that no separate suit would lie to recover the enhanced interest under the agreement *Hurkissen Dass Serowjee* v *Nilmoni Baran Chander Banerjee*, 6 C. W. N. 27, distinguished *Venkata Subramania Ayyar* v *Kora Kannan*, I. L. R. 26 *Mad* 19, and *Lalji Singh* v *Gaya Singh*, I. L. R. 25 *All* 317, followed. GOPAL SAHU v BRIJ KISHORE PERSHAD (1905)
I. L. R. 32 Calc 91
s.c. 9 C. W. N. 100

——— ss. 230, 258, 295—*Decree for sale with personal remedy for balance unsatisfied governed by s. 258 even before sale of mortgaged property—S. 208 applicable even to decrees for sale alone, but not to receipt by mortgagee in possession—Mortgage decree under s. 88 of the Transfer of Property Act*—A decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under ss. 230, 258 and 295 of the Code of Civil Procedure although they will not be so under ss. 220 and 223 of the Code *Kommachi Kather* v *Pokker*, I. L. R. 2 *Mad* 107 and *Hurd* v *Tara Prasanna Mukherji*, I. L. R. 11 *Calc* 719 referred to and approved. The provisions of the Code of Civil Procedure relating to execution of decrees apply with a few exceptions to mortgage decrees under the Transfer of Property Act. There is a conflict between the provisions of s. 258 of the Code of Civil Procedure and the provisions of the Transfer of Property Act *Mallikarjunudu Setti* v *Lingamurti Pantulu*, I. L. R. 25 *Mad* 214, referred to and approved. Receipts by a mortgagee in possession after decree though payments to the mortgagee under s. 20 of the Limitation Act will not be "moneys payable under the decree" within the meaning of s. 258 of the Code of Civil Procedure and consequently the provisions of that section will not apply to such receipts *Mallikarjuna Sastri* v *Narasimha Rao*, I. L. R. 24 *Mad* 412, overruled VADHINADA SAMY AYYAR v SOMASUNDRAM PILLAI (1905)
I. L. R. 29 Mad. 47

——— s. 266—*Attachment—Debt—Monthly allowance, if "debt"—Contingent and existing*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

debt—Debt payable in future—Attachment of part already accrued due.—A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such, is attachable in execution—being a debt, accruing due and actually existing with a right to payment on and after the first of the following month. The decree-holder applied on the 21st December for the issue of a prohibitory order in respect of a half of the allowance for the month of December, and the order was issued on the 23rd December. *Held*, that the attachment was validly made, inasmuch as three weeks of the December allowance had already become an existing debt, though payable on a future date. *Haridas Acharjia* v. *Barada Kissore Acharjia*, *I. L. R. 27 Calc. 38*; *Tuffuzzool Hossein Khan* v. *Rughoo Nath Pershad*, *14 Moo. I. A. 40*, referred to. DAMBAR KOERI *v.* RAI SHAM KISSEN DAS (1905) . . . . . 9 C. W. N. 703

——— s. 268—*Mortgage debt—Attachment—Copy of order, not affixed in Court-house—Illegality.*—A mortgage-debt was attached, but no copy of the attachment order was affixed in the Court house as required by s. 268 of the Civil Procedure Code: *Held*, that the plaintiff, who took an assignment of the mortgage bond four days after the order of attachment, acquired a valid title, the attachment being ineffectual. SATYA CHARAN MUKHERJEE *v.* MADHUB CHUNDER KARMOKAR (1905). 9 C. W. N. 693

——— s. 273.

See SALE . I. L. R. 32 Calc. 1104

——— ss. 276, 295—*"Assets realised by sale or otherwise in execution of a decree," what are.*—The words "assets realised by sale or otherwise in execution of a decree" in s. 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached. The assets are not realised by the attachment, but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under s. 295 of the Code of Civil Procedure. *Gopal Lal* v. *Chunni Lal*, *I. L. R. 8 All. 67*, and *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*, *I. L. R. 6 Bom. 588*, referred to and approved. *Lakshmi* v. *Kuttunni*, *I. L. R. 10 Mad. 57*, and *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia*, *I. L. R. 16 Bom. 91*, referred to. *Manilal Umedram* v. *Namabhai Maneklal*, *I. L. R. 28 Bom. 264*, distinguished. *Sew Bux Bogla* v. *Shib Chunder Sen*, *I. L. R. 13 Calc. 225*, and *Prosonnomoyi Dassi* v. *Sreenauth Roy*, *I. L. R. 21 Calc. 809*, approved. An attachment ceases to be operative from the moment money is paid into Court or at the latest from the time satisfaction is entered. *Kunhi Moossa* v. *Makki*, *I. L. R. 28 Mad. 482*. VIRUDHAPEIYA TIRTHASWAMI *v.* YUSUF SAHIB (1905) . I. L. R. 28 Mad. 380

——— ss. 278, 281, 283.

See LIMITATION . I. L. R. 32 Calc. 537

——— s. 278—*Execution of decree—Decree for sale on a mortgage—Prior mortgagee not entitled to intervene in execution proceedings.*—In a suit for sale on a mortgage the plaintiff obtained a decree and an order absolute for sale of the mortgaged property. A person who had not been a party to the suit intervened, alleging himself to be a prior mortgagee, and objected to the sale, and the sale was stopped. *Held*, that the prior mortgagee, if he were one, was not entitled to intervene in these execution proceedings and that the order allowing his objection was passed without jurisdiction and was a proper subject for revision. HUKAM SINGH *v.* RAGHUBIR SARAN (1905) . I. L. R. 27 All. 700

——— ss. 278, 283—*Limitation Act, Sch. II, Art. 12—Suit to establish right to property sold in execution Limitation—Sale without decision as to rights of intervenor.*—When an intervenor claims a share of attached property the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the Court omits to do so, and sells the attached property subject to the intervenor's claim, this is no valid order under ss. 280, 281 or 282 of the Code of Civil Procedure, and the limitation of one year for a suit under s. 283 of the Code does not apply. *Manohar Khan* v. *Troylukonath Ghose*, *4 W. R. 35*, followed. UDIT NARAIN SINGH *v.* MURTAZA KHAN (1905). I. L. R. 27 All. 464

——— s. 283—*Execution of decree—Suit for declaration that property is liable to attachment and sale—Valuation of suit.*—A decree-holder holding a decree from a Court of Small Causes, which has been transferred to a Munsif for execution, attached certain property as that of the judgment-debtor. The judgment debtor's wife objected under s. 278 of the Code of Civil Procedure that the property was hers. This objection prevailed, and the property was released from attachment. The decree-holder then filed a regular suit against the objector and the judgment-debtor to have it declared that the property was liable to attachment and sale in execution of her decree. *Held*, that the proper valuation of such suit for the purposes of jurisdiction was the amount of the decree under[illegible] not the value of the [illegible] DAS v. KA[illegible]

[illegible] made in second appeals—S. 587 of the [illegible] as well as first appeals Civil Procedure authorises an application to explain or [illegible] losing in a plaintiff-respondent in second appeals and [illegible] extends to such appeals the provisions of ss. 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under ss. 368 and 582 and for the purposes of limitation fall

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

different grades a sale effected by the Court of lower grade is a nullity, whether such sale was effected in ignorance of the attachment imposed by the Court of higher grade or not and consequently a purchaser at such sale has no *locus standi* to sue for a declaration that a subsequent sale held in pursuance of the attachment imposed by the Court of higher grade is not valid *Chiranji Lal* v *Jawahir Mal, Weekly Notes 1904 p 95* followed HAR PRASAD *v* JAGAN LAL (1905) **I. L. R. 27 All. 56**

———— s. 287—*Execution of decree—Question of saleability of property in execution—Property described in decree as a permanent tenancy—Estoppel—Duty of Court executing decree*—In execution of a decree on a compromise for payment of a certain sum of money and in default thereof for the sale of certain properties therein specified, application was made to sell certain fields described in the decree as held by the judgment-debtor on a permanent tenure The judgment-debtor objected that the properties were not saleable being held by an occupancy tenure. *Held*, that this objection was not open to the judgment-debtor, inasmuch as it was one which he might have raised in the suit in which the decree was passed, but did not But the statement as to tenure contained in the decree was not binding on third persons *Per* BURKITT, J—It would be the duty of the Court executing the decree, should it have reason to believe that the property, the sale of which was asked for, was held by occupancy tenure, to notify that fact in the proclamation of sale as a warning to prospective bidders. *Ram Janam Ram* v *Kameshar Rai, Weekly Notes 1892 p 5*, followed. BASDEO PRASAD *v* JUTHAN RAM (1905) **I. L. R. 27 All. 681**

———— s. 295

See MORTGAGE

———— s. 295—*Assets—Rateable distribution—First decree against three judgment debtors—Subsequent decree against only one of them*—S 295 of the Civil Procedure Code (Act XIV of 1882) governs, where the first decree is against three judgment-debtors and the decree on which the petitioner relies is against one of those three. *Nimbaji* v *Vadia Venkati, I L R 16 Bom 683* not followed. CHHOTALAL *v* NABIBHAI (1905) **I. L. R. 29 Bom. 528**

———— s. 295—*Execution of decree—Suit for refund of assets wrongly distributed*—D held a simple money decree against S P held a decree under s. 90 of the Transfer of Property Act against surety for tho , and as representative of B, the original another, he must have been passed against S and decree is going to be executed again of his decree is immaterial whether such notice is given to the Court which passes the decree or the Court to which it is sent for execution. LAKSHMISHANKAR *v* RAGHUMAL (1905) **I. L. R. 29 Bom 29**

———— s. 257A—*Agreement to give time on condition of payment of higher rate of interest—Sanction of Court not accorded—Non-extinction*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

———— s 295—*Execution of decree—Application for rateable distribution of assets—Notice of such application to other decree holders unnecessary*—*Held* that it is nowhere provided by law either that an application for rateable distribution of assets realized in execution of a decree cannot be made in the course of execution proceedings taken by the applicant himself, but must be made in the course of execution proceedings initiated by some other decree-holder, or that notice of such an application having been made must of necessity be given to the other decree-holders CHUNI LAL *v* JUGAL KISHORE (1905) . **I. L. R 27 All. 132**

———— s 310A.

See DEPOSIT IN COURT **I. L. R. 32 Calc 107**

———— ss 310A, 588—*Appeal—No appeal from an order setting aside a sale under s 310A.*—*Held*, that no appeal lies from an order under s 310A of the Code of Civil Procedure setting aside a sale, whether the auction purchaser is the decree holder or an outsider *Mendai Lal* v *Bhujja Singh, Weekly Notes 1895 p 140*, referred to KUBER SINGH *v* SHIB LAL (1905) . **I. L. R. 27 All. 263**

———— s 311.

See SALE IN EXECUTION OF DECREE **I. L R. 32 Calc 296**

———— s. 312.

See LIMITATION ACT, SCH. II, ART 179

———— ss 313 and 315—*Execution of decree—Sale in execution of property to part of which only the judgment-debtor had a title—Rights of purchaser—Contribution*—In execution of a decree for sale on a mortgage part of the mortgaged property was sold by auction but after the sale it was found that the judgment debtor had no title to about two thirds of the property sold The auction purchaser then sued the representatives of the mortgagee for contribution as against the remainder of the mortgaged property *Held* that the suit would not lie An auction purchaser has in the absence of fraud no remedy, unless the judgment-debtor has no saleable interest at all in the property sold as his and then only under ss 313 and 315 of the Code of Civil Procedure; but Transfer of Property Code of when the title Setti v I these sections do not apply of the Mad 244 to part only receipts by a mortgagee the judgment-debtor to part only though payment property sold is defective. *Santo Chandra* Limitation property *v Nain Sukh, I L R 23 All 355*, the defendant followed MUHAMMAD RAHMAT ULLAH *v* BACHHO Code **I. L. R. 27 All. 537**

(1905)

———— s. 317—*Execution of decree—Suit based on the ground that the certified purchaser is not the real purchaser—Benamidar*—One Habib Alam in execution of a decree for money against Masud Alam attached and brought to sale the one-third share of Masud Alam in certain house property, and it was purchased by Aziz Alam the son of the judgment debtor Subsequently the same property was again attached and sold at the instance of Habib

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Alam, and this time was purchased by Khuda Bakhsh. Khuda Bakhsh was obstructed in obtaining possession of the property, and thereupon brought a suit for possession to which he made Masud Alam and others, alleged to be co-parceners in the property, parties defendants, but not the auction purchaser Aziz Alam. Aziz Alam was, however, added as a defendant under s. 32 of the Code of Civil Procedure. *Held*, that to these facts s. 317 of the Code was applicable and the suit must be dismissed. KHUDA BAKHSH *v.* AZIZ ALAM (1905).
I. L. R. 27 All. 194

——— s. 317—*Execution of decree—Sale in execution—Suit by certified against real purchaser—Plea that the purchase was benami for the defendant.—Held*, that s. 317 of the Code of Civil Procedure does not debar a person in possession of property purchased at an auction sale held in execution of a decree, when sued for the rents and profits of such property by the certified purchaser, from setting up as a defence to the suit that the certified purchaser was only a benamidar on his behalf. *Bishan Dial* v. *Ghazi ud-din, I. L. R. 23 All. 175*, discussed. GHAZI-UD-DIN *v.* BISHAN DIAL (1905).
I. L. R. 27 All. 443

——— s. 322 (a), (b) and (d).

See MADRAS COURT OF WARDS REGULATION.

——— s. 328.

See JUDICIAL PROCEEDING, OFFENCE IN THE COURSE OF.
I. L. R. 32 Calc. 367

——— s. 331—*Execution of decree—Resistance or obstruction by person other than the judgment-debtor—Investigation of claim—Nature of investigation.*—A Court investigating, under the provisions of s. 331 of the Code of Civil Procedure, a claim to property sought to be taken in execution of a decree is not confined to the mere question of possession, but is bound to decide on the title to the property in dispute. *Moulakhan* v. *Gorikhani, I. L. R. 14 Bom. 627; Bapujirao* v. *Fatesing Shahaji Bhosle, I. L. R. 22 Bom. 967*, and *Rucha Rai* v. *Purmeshur Dyal, All. H. C. (1870) 252*, followed. MAHIP RAI *v.* DWARKA RAI (1905).
I. L. R. 27 All. 453

——— ss. 351 and 352.

See PRE-EMPTION.

——— ss. 351, 355, 357—*Insolvency of judgment-debtor—Receiver appointed, but no order of discharge—Application by creditor to execute decree by arrest of insolvent—Maintainability.—S* applied to the Court of a District Munsif to be declared an insolvent. After notice to his creditors, amongst whom was the present petitioner, the holder of a decree against *S*, the District Munsif passed an order declaring *S* insolvent. A receiver was appointed to take charge of the insolvent's properties and he was put in possession of all of them excepting two items, one of which was not included in the schedule. The receiver realised assets and made distributions among the creditors entitled, but no order was passed by the Court either discharging or refusing to discharge the insolvent. The present petitioner then applied to the Court for the arrest of the insolvent in execution of his decree:—*Held*, that in the circumstances the insolvent could not be arrested. If an insolvent prevents the receiver from obtaining possession of his properties or if it subsequently transpires that he has committed some act of bad faith, then the Court may refuse his discharge, under s. 355 of the Code of Civil Procedure. *Semble*, that in such a case it might be open to creditors to apply to execute their decrees. PANANGUPALLI SEETHARAMAYA *v.* NANDURI EAMACHENDRUDU (1905) . . I. L. R. 28 Mad. 152

——— s. 368—*Appeal by guardian, abatement of—Laches of guardian, effect of—Application on behalf of minors to restore appeal—Right to apply joint and not several—Limitation Act (XV of 1877), s. 7.*—Where two majors and the guardian of two minors jointly preferred an appeal in which they were jointly interested, and on the death of the sole respondent the appeal was allowed to abate under s. 368 of the Code of Civil Procedure, the minor appellants cannot on the application of another guardian have the appeal restored and proceeded with. *Per* DAVIES, *J.*—The order of abatement under s. 368 of the Code of Civil Procedure is absolute. The minors being bound by the acts of their guardian, there was no appeal pending and the application could not be treated as an application under s. 368 of the Code of Civil Procedure to which the provisions of s. 7 of the Limitation Act might be applied as s. 368 of the Code of Civil Procedure contemplates an appeal pending. Even if it could be so considered, the application would be barred as the minors were interested jointly with others who laboured under no disability. *Periasami* v. *Krishna Ayyan, I. L. R. 25 Mad. 431*, followed. *Per* SUBRAHMANIA AYYAR, *J.*—On the death of the respondent, the right to have his representatives added as parties vested *jointly* and not *severally* in the appellants, whatever may be the nature of their interests in the subject matter of the appeal. *Periasami* v. *Krishna Ayyan, I. L. R. 25 Mad. 431*, followed. PARU *v.* VARIANGATTIL RAMAN MENON (1905) . . I. L. R. 28 Mad. 359

——— ss. 368, 582, 587—*Limitation Act (XV of 1877), Sch. II, Arts. 175 (c), 178—Arts. 175 (c) applies to applications made in second appeals as well as first appeals.*—S. 587 of the Code of Civil Procedure authorises an application to bring in a plaintiff-respondent in second appeals and extends to such appeals the provisions of ss. 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under ss. 368 and 582 and for the purposes of limitation fall

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

under Art. 175 (c) of Sch. II of the Limitation Act and not under Art. 178 VARALAGADDA NARASIMHAM v. VANIPILLA SAHIB (1905) I. L. R. 28 Mad. 489

——— s. 371—*Limitation Act (XV of 1877), Art 175—Applications for abatement and revival heard together—Form of order of revival*—An application for abatement and an application for revival of a suit were set down for hearing together. The latter was made after six months of the plaintiff's death. *Held*, that on the Courts being satisfied that the legal representative of the deceased plaintiff was prevented by sufficient cause from continuing the suit, the proper order to pass was to declare the suit to have abated and then at once pass an order under s. 371 of the Civil Procedure Code setting aside the abatement and reviving the suit. RAM PROTAP CHOWDRY v. LAL CHAND (1905) . . . 9 C. W. N. 389

——— s. 372.

See LIMITATION ACT

——— s. 372—*Meaning of "other cases" in s. 372—Mortgage decree—Order absolute for sale—Death of decree-holder—Pending suit—Application for substitution by legal representatives of a decree holder, if under s. 372 of Civil Procedure Code*—The words "other cases" in s. 372 of the Civil Procedure Code mean cases other than those specifically mentioned in the previous sections in Chapter XXI. If therefore the preceding sections, though they may have dealt with the event of death, have dealt so with particular cases only, other cases will fall under s. 372. S. 36 of the Civil Procedure Code refers to death only as occurring before decree. A mortgage suit, even after a decree has been made and an order absolute for sale passed, is a *pending* suit until the sale actually takes place, and an application made before sale by the legal representative of the deceased decree-holder for substitution would fall within s. 372 of the Civil Procedure Code. *Chunni Lal v. Abdul Ali Khan, I. L. R. 23 All. 331, 334*, referred to. *Panna Lal v. Aghore Nath Neogy*, unreported, decided by SALE, J., on 10th May 1893 followed. BHUBAN DAS KHETTRY v. NIKHANTO GANGULY (1905) 9 C. W. N. 171

——— ss. 373, 374 *Limitation Act (XV of 1877), s. 14 Cause of like nature—Withdrawal of a suit with permission to bring another—Limitation*—On the 15th April 1898 two plaintiffs, a father and son, filed a suit against two defendants to recover damages for an assault which took place on the 7th April 1898. The defendants pleaded mis-joinder of parties and of causes of action. On the 14th November 1901, the High Court on appeal gave effect to this plea of the defendants, but under s. 373 of the Civil Procedure Code gave leave to one of the plaintiffs, whose name was struck out, to file, if so advised, a fresh suit in respect of his own cause of action. The plaintiff, whose name was so struck out, filed this suit on the 13th February 1902. *Held*, that the second suit was barred by limitation, for when a suit is withdrawn under s. 373 of the Civil Procedure Code, with permission to bring a fresh suit, the effect of s. 374 of the Code is that limitation is to apply to the second suit as if it was the first. *Held*, also, that s. 14 of the Limitation Act did not apply to such a case. *Krishnaji Lakshman v. Vital Ramji, I. L. R. 12 Bom. 625*, followed. VARALAL v. SHORESHWAR (1905) . . I. L. R. 29 Bom. 210

——— ss. 373, 412—*Pauper—Suit—Withdrawal of a suit with permission to bring fresh suit—Failure in the suit—Adjudication Court-fees, payment of*—Where a pauper plaintiff with draws a suit with permission to bring a fresh suit he is liable to pay to Government the Court-fees which would have been paid by him, if he had not been permitted to sue as a pauper. The words "if the plaintiff fails in the suit" in s. 412 of the Civil Procedure Code (Act XIV of 1882) apply to the withdrawal of a suit under the provisions of s. 373 of the Code SECRETARY OF STATE v. NARAYAN BALKRISHNA (1905) . . . I. L. R. 29 Bom. 102

——— ss. 373 and 583—*Partition suit—Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit Decree dismissing appeal—Appeal*—A decree for partition was passed in the original Court based in part on an agreement to which the plaintiff and some of the defendants were parties. The plaintiff appealed and subsequently purported to withdraw from the suit. The Judge in appeal passed a decree dismissing the appeal, but determining that the effect of the withdrawal was to set aside the decree passed by the first Court. Some of the defendants preferred a second appeal. *Held*, that when in a partition suit defendants have by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing from the suit in the Appellate Court. A question having arisen as to whether or not the decree of the lower Appellate Court was appealable under ss. 373 and 583 of the Civil Procedure Code (Act XIV of 1882). *Held*, that ss. 373 and 583 of the Civil Procedure Code do not support the conclusion that rights actually vested by the decree of the first Court can afterwards be annulled by the plaintiff's withdrawing of his own free will and without permission of the Court. The result of the adjudication was that there was a formal expression of an adjudication by the lower Appellate Court upon a right claimed by the defendants (appellants in second appeal) and thus there was a decree within the meaning of the Civil Procedure Code from which an appeal would lie. SATYABHAMABAI v. GANESH HARI KRISHNA (1905) . . I. L. R. 29 Bom. 13

——— ss. 383, 386—*Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process*—The present appellants obtained a decree against the late head of a matt, and, in execution

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

thereof, attached certain gold and silver articles. The respondent, the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased, but property belonging to the mutt. The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, then applied to the Subordinate Judge to take his evidence on commission stating that he was unable, of his own personal knowledge, to give any evidence material to the questions at issue, and alleging that the appellants were insisting on his appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in a Court as a witness. The Subordinate Judge refused to issue a commission. On a revision petition being filed, a single Judge of the High Court set aside the order of the Subordinate Judge and ordered the respondent to be examined on commission. On an appeal being preferred under art. 15 of the Letters Patent:—*Held*, that an appeal lay. *Held also*, that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the provisions of the Code of Civil Procedure, and s. 386 is exhaustive, and provides for all the cases in which the Legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction. *Held further*, that a litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal, which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases. This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its process. In the present case, the appellant's application was not *bonâ fide*, and the respondent's attendance in Court was required not for the purpose of obtaining material evidence but from other motives, and the order for the issue of a commission was therefore rightly made. VEERABADRAN CHETTY *v.* NATARAJA DESIKAR (1905) I. L. R. 28 Mad. 28

——— ss. 389, 390—*Evidence taken on commission, when evidence in suit—Meaning of "forming part of the record" in s. 389, Civil Procedure Code.*—Evidence taken on commission does not become evidence in the suit until the same has been tendered and read as evidence in the suit by the party in whose behalf it has been taken. *Dwarka Nath* v. *Gunga Dayi, 8 B. L. R 102, Appendix; Nistarini* v. *Nundo Lal, 3 C. W. N. ccxxxix 239)*, dissented from. *Kusum'Kumari* v. *Satya Ranjan, 7 C. W. N. 786*, followed. HEMANTA KUMARI *v.* BANKU BEHARI SIKDAR (1905) 9 C. W. N. 794

——— s. 396—*Stamp Act (II of 1899), s. 2 (15)—Decree for partition—Commissioner's report—Decree in accordance—Final order—Instrument of partition—Stamp.*—A decree for partition passed in accordance with a Commissioner's report under s. 396 of the Civil Procedure Code (Act XIV of 1882) is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition under s. 2 (15) of the Stamp Act (II of 1899). BALARAM *v.* RAMKRISHNA (1905). I. L. R. 29 Bom. 366

——— s. 435—*Plaint in suit by Corporation—Verification by "principal officer"—Personal knowledge of verifier, if necessary—Amendment—Rejection.*—S. 435 of the Civil Procedure Code does not require a "principal officer" of a Corporation to verify a plaint from actual personal knowledge. The section shows that a verifier may depose upon his information and belief. Where in such a case the verifier deposed from information and belief; *Held*, that even if it were held that the plaint was not properly verified, it should not have been rejected, but leave should have been granted to amend it. THE PORT CANNING AND LAND IMPROVEMENT CO., LD. *v.* DHARANIDHAR SARDAR (1905) . . . 9 C. W. N. 608

——— s. 503—*Receiver—Appointment of new Receiver in place of original Receiver—Civil proceedings instituted by original Receiver and pending at date of appointment of new Receiver—Necessity for making new Receiver a party.*—When a Receiver appointed under s. 503 of the Code of Civil Procedure institutes civil proceedings and is then replaced by another Receiver, it is necessary that the new Receiver should be made a party to those proceedings. Observations on the mode and circumstances in which a new Receiver will be made a party. AKULA PARADESI *v.* DHELLI JAGANNADHA ROW (1905) I. L. R. 28 Mad. 157

——— ss. 508, 514, 516 and 621—*Arbitration—Award—Validity of award made, but not reaching the Court within the time limited.*—In the case of an arbitration made under the order of a Court it is sufficient if the award be made, that is completed and signed by the arbitrators, within the period limited under s. 508 of the Code of Civil Procedure; it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period. *Arumugam Chetti* v. *Arunachalam Chetti, I. L. R. 22 Mad. 22*, and *Umersey Premji* v. *Shamji Kanji, I. L. R. 13 Bom. 119*, followed. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar, I. L. R 13 All. 300*, referred to. *Behari Das* v. *Kalian Das, I. L. R. 8 All. 543*, dissented from. ASAD-UL-LAH *v.* MUHAMMAD NUR (1905) . I. L. R. 27 All. 459

——— ss. 520, 525 and 526—*Arbitration—Application to file a private award—Award in excess of powers of arbitrator—Court not competent to remit award.*—A Court to which an application is made under s. 525 of the Code of Civil Procedure to file an award made without the intervention of a Court has no power to amend the award or to remit it for reconsideration, but only possesses th

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*contd*

power to file and enforce it or to reject the application. *Alarakhia Shikji* v *Jehangir Hormasji*, *10 Bom H C 391*; *Jwala Singh* v *Narain Das*, *I L R 3 All 541*; *Mana Vikrama* v *Mallicheru Krishnan Nambudri*, *I L R 3 Mad 69*, and *Dandekar* v *Dandekars*, *I.L R 6 Bom 663*, referred to MUSTAFA KHAN v ISHRI BIBI (1905) . . . I L R. 27 All 526

——— ss. 521, 522—*Allegations of arbitrator's misconduct—Decree following award—Appeal from the decree*—The plaintiff filed a suit for the dissolution and winding up of a partnership. The matters in dispute were referred to arbitration by an order of the Court; an award was made; an application was made by the appellant to set aside the award on the ground of alleged misconduct of the arbitrator; the application was refused; judgment was given according to the award, upon the judgment so given a decree was passed. From this decree the appellants preferred an appeal. *Held*, unless it is shown that the award is illegal *ab initio* or in other words where there is no award in law, no appeal lies from a decree following a judgment given according to an award. *Nandram Dalsram* v *Nemchand Jadaveland*, *I L R 17 Bom. 337*, approved. *Kali Prosanno Ghose* v *Rajani Kant Chatterjee*, *I L R 23 Calc 141*, referred to. WALJI MATHURADAS v ESSI UMERJEE (1905)
I. L. R. 29 Bom. 285

——— s. 523—*Award on a reference not agreed to by all the parties to the suit, validity of—Court's decree on such award—Right of appeal from.*—An award on a reference under s 506 of the Civil Procedure Code not agreed to by all the parties to the suit, is invalid in law. Both an appeal and a second appeal lie from a decree passed upon such an award. PARSIDH NARAIN SINGH v GHANSHYAM NARAIN SINGH (1905) . . 9 C W. N 873

——— s 523.

See LIMITATION ACT, s 21

——— s. 525—*Reference to arbitration—Award—Question whether the matter had been referred and an award had been made—Question which the Court can and ought to decide*.—When an application is made under s 525 of the Civil Procedure Code (Act XIV of 1882) to file an award as an award made in the matter which had been referred to arbitration, the question, if raised, whether the matter had been referred and an award had been made thereon, is one which the Court, to which the aforesaid application has been made, can and ought to decide *Samal Naidu* v *Jaradakker*, *I L R 9 Bom 254*, explained. The principle of *stare decisis* is of undoubted value in its bearing on the law of property, but the doctrine is not of the same importance in the department of procedure when the practice of one Court is to be brought into conformity with the settled practice of other Courts and the plain terms of the Code. MANILAL HARGOVANDAS v VANMALIDAS AMRATLAL (1905)
I. L. R. 29 Bom. 621

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

——— s 539

See RIGHT OF SUIT

——— s 539—*Public trust—Sanction of the Advocate General, when necessary, under the Civil Procedure Code*—S 539 of the Civil Procedure Code contemplates the existence of a dispute of such a public nature that the intervention of the Advocate-General is necessary to decide if and by whom a suit should be brought to establish a public right. *Sajedur Raja* v *Gour Mohun Das*, *I L R. 24 Calc 419, 425*, referred to. MOSHAN BIBEE v KHADEM HOSSEIN (1905) . . 9 C. W. N. 151

——— s. 539—*Suit by an individual to establish a common right to a public religious trust—Other persons associated as co-plaintiff—If such suit falls within s 30 or s 539—Ss 539 and 30 if mutually exclusive—S 539, construction of*—The words of s. 539 of the Civil Procedure Code contemplate the existence of persons, other than those permitted to sue, who may be affected. The existence of such other persons or the joinder of some of them as co-plaintiffs does not take away the right of an individual to sue under that section, provided his rights, as contemplated in that section, have been infringed. The Chinese community of Calcutta are divided into two classes, the Puntis and the Hakalus. The Puntis being excluded from the Chinese temple and cemetery, five of them after obtaining the sanction of the Advocate-General under s 539 of the Civil Procedure Code, instituted this suit for a declaration that the temple and cemetery were public religious and charitable trusts for the benefit of the said community and as such, the Puntis, including the plaintiffs, were entitled to the benefits thereof. Objection was taken that the suit, as framed, was not maintainable as it fell within s 30 of the Civil Procedure Code and not under s 539. *Held*, that the suit was maintainable. MACMOCHIE v LEE CHIN (1905) . 9 C. W. N. 594

——— s. 539—*'Under the trust' meaning of—Power of appointing additional trustees or controlling body*.—Under s. 539 of the Code of Civil Procedure, the Court in sanctioning a scheme may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it. The words 'under the trust' in s. 539 of the Code of Civil Procedure have no reference to such original constitution or the rules. The Court of Chancery in England has always exercised such powers, and in the absence of express words restricting the powers of Courts in this country, the Legislature must be presumed to have conferred similar powers upon them by s. 539 of the Code of Civil Procedure. *Chintaman Bajaji Deo* v *Dhondo Ganesh Dev*, *I L R 15 Bom 612*, and *Ananji* v *Narayan*, *I L R 21 Bom 536*, followed. A scheme framed by the Court may be liable to variation for good cause shown. *Re Browne's Hospital* v *Stamford*,

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

60 Law Times 288, referred to. The directions in a scheme framed under s. 539 of the Code of Civil Procedure may be enforced in execution of application by persons interested. *Damodarbhai v. Bhogilal, I. L. R. 21 Bom. 45*, followed. PRAYAG DOSS JI VARU, MAHANT *v.* TIRUMALA SRIRANGACHARLAVARU (1905).
I. L. R. 28 Mad. 319

——— s. 544—*Decree—Appeal.*—When one of several plaintiffs appealing against a decree which proceeded on grounds common to them all, died during the pendency of the appeal and substitution was not made within time. *Held*, that the appellants were not entitled to the benefit of s. 544 of the Civil Procedure Code. PROTAP CHANDRA CHATTERJEE *v.* DURGA CHARAN GHOSE (1905).
9 C. W. N. 1061

——— s. 544—*Appeal by one of several defendants—Ground common to all.*—Plaintiffs sued on a mortgage bond. The defence, which was common to all the defendants, was that the mortgage was a sham. The Subordinate Judge upheld the mortgage bond and decreed in plaintiffs' favour. The fifth defendant, a subsequent mortgagee, alone appealed to the District Judge, who reversed the decree and dismissed the suit. Plaintiffs appealed to the High Court:—*Held*, that the decree of the Subordinate Judge proceeded on a ground common to all the defendants and that the decree of the lower Appellate Court enured for the benefit of the defendants, who did not appeal. ANNAMALAY CHETTIAR *v.* PITCHU AYYAR (1905).
I. L. R. 28 Mad. 122

——— ss. 544, 561—*Practice—Appeal—Appeal by one defendant making co-defendants and plaintiffs party respondents—No appeal or memorandum of objections filed by plaintiff—Relief granted to plaintiff-respondent in decree of Appellate Court—Appellate Court—Procedure—Jurisdiction.*—Where a respondent to an appeal fails to give the notice required by s. 561 of the Code of Civil Procedure, it is not open to the Appellate Court to grant any relief to that respondent, in a case where the granting of such relief is not necessarily incidental to the relief granted to a party, who has appealed. *Soira Padmanabh Rangappa* v. *Narayan Rao Bin Vithal Rao, I. L. R. 18 Bom. 520*, distinguished. *Hudson* v. *Basdeo Bajpaye, I. L. R. 26 Calc. 109*, referred to. *Rup Jaun Bibee* v. *Abdul Kadir Bhuyan, I. L. R. 31 Calc. 643*, referred to and commented on. KULAIKADA PILLAI *v.* VISWANATHA PILLAI (1905).
I. L. R. 28 Mad. 229

——— s. 545—*Execution of decree—Order refusing stay—Appeal—Deliberate exercise of discretion by lower Court.*—An order refusing to stay execution of a decree under s. 545 of the Civil Procedure Code (Act XIV of 1882) is not appealable. *Musaji Abdulla* v. *Damodardas, I. L. R. 12 Bom. 279*, doubted. RAMCHANDRA *v.* BALMUKUND (1905).
I. L. R. 29 Bom. 71

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— ss. 545, 546—*Stay of execution—Power of Appellate Court.*—It is not competent to an Appellate Court to stay proceedings in execution of a decree of a subordinate Court merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under s. 108 of the Civil Procedure Code. BHAGWAT RAJ KOER *v.* SHEO GOLAM SAHU (1905).
9 C. W. N. 123

——— s. 561.

See BOMBAY CITY IMPROVEMENT ACT.
I. L. R. 29 Bom. 514

See RENT RECOVERY ACT, s. 11.

——— s. 561—*Decree—Respondent.*—It is not necessary to entitle a respondent to support a decree upon a particular ground under s. 561 of the Civil Procedure Code, that the ground should have been in express terms decided against him. SRISH CHANDRA ROY *v.* MUNGRI BEWA (1905).
9 C. W. N. 14

——— s. 562—*Remand—Appeal Court.*—Where a Subordinate Court has dealt with questions arising on the merits of the case, no order of remand can be made by the Appellate Court under s. 562 of the Civil Procedure Code, but if the Appellate Court is of opinion that there should be a finding upon any particular issue, or further evidence should be taken on any such issue, it may make an order of remand under s. 566 of the Civil Procedure Code. RAKHIT MAHANTA *v.* PUDDO BAURI (1905).
9 C. W. N. 54

——— s. 562—*Remand - Preliminary point—Suit decided with reference to some only of several issues framed.—Held*, that it is competent to an Appellate Court to remand a case under s. 562 of the Code of Civil Procedure where the Court of first instance, having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided. *Sheoambar Singh* v. *Lalla Singh, I. L. R. 9 All. 30, foot-note*, and *Ramachandra Joishi* v. *Kazi Hassim, I. L. R. 16 Mad. 207*, followed. MATA DIN *v.* JAMNA DAS (1905) . . . . I. L. R. 27 All. 691

——— ss. 562, 588—*Remand, order of—Right of appeal—Appeal after suit finally disposed of—Order, if may be impugned, in appeal from final decision—Tenancy Transferability—Custom.*—An appeal from an order of remand passed under s. 562 of the Civil Procedure Code cannot be entertained, if presented after the final disposal of the suit. *Jatinga Valley Tea Co.* v. *Chera Tea Co., I. L. R. 12 Calc. 45*, distinguished. The right of appeal given by s. 588 of the Civil Procedure Code, from orders specified in that section ceases with the disposal of the suit. *Semble*—An order of remand under s. 562 of the Civil Procedure Code is an order which affects the decision of the suit on the merits, and exception may be taken to the validity of such an order in an appeal from the final decision. MADHU SUDAN SEN *v.* KAMINI KANTA SEN (1905) . 9 C. W. N. 895

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued*

——— s. 583—*Limit to remand—Custom opposed to Statute, validity of—Rent Recovery Act (VIII of 1865), s 11—Cultivation by wells constructed at tenants cost, liability to enhanced rent for—Payment of enhanced rent for a number of years, whether an implied contract to pay—Agreement and contract, difference between—Tenant with right of occupancy, right of, to construct wells without permission of landholder*—Ryots with permanent rights of occupancy in a zamindari constructed *wells at their own cost* without obtaining the permission of the zamindar and cultivated dry lands with garden crops for periods ranging from 1 to 18 years Suits were brought by the ryots before the Sub-Collector under s 8 of the Rent Recovery Act to compel the defendant, the zamindar, to grant them proper pattas for fasli 1312, alleging that the pattas tendered were illegal as they charged the higher garden rate for dry lands cultivated by them with the aid of wells constructed at their own cost The defendant pleaded that he was entitled to the enhanced rate (1) by custom, (2) by virtue of a contract to be implied from previous payments. No consideration for such a contract was however alleged The Sub-Collector framed two issues—one as to the existence of the custom set up by the defendant and another as to whether the previous payments by the plaintiffs operated as an estoppel or evidenced an implied contract to continue to pay the enhanced rates The Sub-Collector did not record evidence as to custom, holding that such custom, even if proved, could not deprive the plaintiffs of the benefits expressly given by the Act He also held that any such implied contract as that set up by the defendant would be illegal as opposed to the provisions of the Act He passed a decree, that the defendant should grant pattas as claimed by the plaintiffs. On appeal the District Judge held that the payment of rent at the enhanced rate raised a presumption that there was a contract to pay such rent; and that, if there was no contract express or implied, the rent must be fixed in accordance with the other provisions of s 11 of the Rent Recovery Act He reversed the decrees of the Sub Collector and remanded the cases for retrial under s 562 of the Code of Civil Procedure On appeal to the High Court *Held, per* SUBRAHMANIA AYYAR, J., that the order remanding the case was not legal as all the questions raised between the parties and on which they went to trial, had been decided, and the questions so raised were purely questions of law A custom can be upheld only so far as it is not in conflict with statute law; and a *custom to pay* enhanced rent for improvements effected by a tenant at his cost is illegal as opposed to the provisions of the Rent Recovery Act. *Fischer v Kamakshi Pillai, I L R 21 Mad 185*, followed. *Gopalasami Chettiar v Fischer, I L R 28 Mad 324*, referred to. It makes no difference whether a tenant constructed wells at his cost prior to or after the passing of Act VIII of 1865. In either case no additional rent can be claimed. *Nagasami Kamia Naick v Iyadi Rama Gowdan, 6 Mad. R R 5*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Payment for a number of years of enhanced rent may be evidence of an *agreement* to pay at that rate, but it will not be binding as a contract, unless supported by *consideration Quære* whether, when the enhanced rate had been paid for a large number of years and when the lapse of time is such as to make it unfair to call on the landlord to prove consideration, a lawful origin may not be presumed. *Gann v Free Fisheries of Whitstable, 11 H L C. 192 at p 203*, referred to No such presumption can be made when the payments have been only for a period extending from one to eighteen years Tenants with permanent rights of occupancy are entitled to construct wells without the permission of the landholder; and a custom requiring such permission may be bad, as unreasonable, and is certainly illegal as opposed to the policy of s 11 of the Rent Recovery Act *Venkatanarasimha Naidu v Dandamudi Kotayya, I L R 30 Mad. 299*, referred to *Held, per* MOORE, J., that the Sub-Collector having disposed of the case on two preliminary issues *the District Judge was right* in remanding the cases under s. *562* of the Code of Civil Procedure ARUMUGAM CHETTI v RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA (1905) I. L. R. 29 Mad. 444

——— s 564—*Whether consent of parties can validate an illegal remand under s 564 of the Civil Procedure Code—Waiver, effect of—Effect of illegal remand by lower Appellate Court on points properly decided* Where the Court of first instance had framed all the necessary issues and decided all those issues, and the lower Appellate Court, reversing the decision of the Court of first instance on one of the issues, remanded the case for retrial *under s 564 of the Code of Civil Procedure*: *Held*, on second appeal, *per* SUBRAHMANIA AYYAR, J—An order of remand, contrary to the provisions of s 564, is not merely irregular, but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail It can be objected to by a party, if he has not given his consent to such a course, and even a party, who has not consented, may be equitably estopped by subsequent conduct from treating such an order as null and void. Such an order of remand does not necessarily vitiate the decision of the lower Appellate Court on questions properly decided by it, which can be attacked only on grounds legally open to the parties on second appeal. It cannot be treated as void for want of jurisdiction, so as to be incapable of being validated by consent or waiver. *Mohesh Chandra Dass v Jamiruddin Mollah, I L R 28 Calc 321*, referred to. *Malikarjuna v Pathanna, I. L R. 19 Mad 479*, referred to *Subrahmania Ayyar v. King-Emperor, I L R 25 Mad 61 at p 97*, followed *Per* MOORE, J—The order of remand was illegal and no consent of parties could make it valid MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v RAMASAMI REDDI (1905) . . I. L. R. 28 Mad. 437

——— s. 584 *Specific relief—Mandatory injunction—Discretion of Court—Injunction*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

refused upon unsubstantial grounds.—In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer the Court found that the building had been erected as alleged by the plaintiffs, but refused to grant them a mandatory injunction upon the ground that "the area was reclaimed by the appellant, defendant, and that others (the plaintiffs included), who have done the same, have been allowed to build on the areas thus reclaimed without any objection, and that no special damage was done." *Held*, that this was not a valid reason for refusing to grant a mandatory injunction; and that such refusal was under the circumstances a good ground of appeal within the meaning of s. 584 of the Code of Civil Procedure. RAM BAHADUR PAL *v.* RAM SHANKAR PRASAD PAL (1905).

I. L. R. 27 All. 688

——— ss. 584, 585—*Second appeal—Grounds of appeal—Reversal by High Court on second appeal of lower Appellate Court's decision—"Substantial error or defect of procedure"—Suit to set aside adoption—Question whether adoption was real and binding.*—In a suit in which the plaintiff prayed that it might be declared that the defendant was not her properly and legally adopted son, that the ceremony of adoption did not take place, and that, if it did, it was ineffectual and invalid owing to misrepresentation, coercion and fraud, the first Court found that there was a real adoption binding on the plaintiff. The lower Appellate Court found that though an adoption had taken place it was not, and was not intended to be, a real adoption, but was a sham transaction entered into by collusion for the purpose of deceiving the Government, a case which was not set up by the parties, nor warranted by the evidence. *Held* (affirming the decision of the High Court), that such a disposal of the suit was a "substantial error or defect of procedure" within the meaning of s. 584 of the Civil Procedure Code (Act XIV of 1882), and that the High Court therefore had jurisdiction to set aside the finding on second appeal. *Anangamanjari Choudhrani* v. *Trinura Soondari Chowdhrani, L. R. 14 I. A. 101*, and *Durga Chowdhrani* v. *Jewahir Singh Chowdhri, L. R. 17 I. A. 122*, referred to. SHIVABASAVA *v.* SANGAPPA (1905)

I. L. R. 29 Bom. 1
L. R. 31 I. A. 154

———ss. 584, 586.

See TORT . . . 9 C. W. N. 495

——— s. 586—*Suit of the nature cognizable by a Court of Small Causes—Appeal.*—The plaintiff sued as widow of a deceased Brahman priest to recover from the defendant certain books containing lists of the clients of her late husband and also a sum of R60, on the allegation that the defendant had been entrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband, and contrary to the terms of the agency, had not handed over the money, which he had obtained from the clients to her. *Held*, that this was a suit of the nature cognizable by a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. HANS RAJ *v.* RAINI (1905) . I. L. R. 27 All. 200

———s. 588.

See APPEAL.

——— s. 588—*Appeal from order—Appeal presented after final disposal of suit—Landlord and tenant—Transfer by tenant—Yearly tenancy—Transfer of tenancy.*—The right of appeal from interlocutory orders ceases with the disposal of the suit. Where on the plaintiff's appeal a suit was remanded under s. 562 of the Civil Procedure Code and on remand the Court of first instance decided the case in the plaintiff's favour and there was no appeal from that decision, but the defendant afterwards appealed to the High Court against the order of remand: *Held*, that the appeal was not maintainable. *Jatinga Valley Tea Company Limited* v. *Cherra Tea Company Limited. I. L. R. 12 Calc. 45*, distinguished. The incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary. *Hari Nath Karmakar* v. *Raj Chandra Karmakar, 2 C. W. N. 122*, followed. *Banee Madhab Banerjee* v. *Joy Kishen Mookerjee, 12 W. R. 495 : 7 B. L. R. 152*, distinguished. MADHU SUDAN SEN *v.* KAMINI KANTA SEN (1905).

I. L. R. 32 Calc. 1023

———ss. 595, 596.

See APPEAL TO PRIVY COUNCIL.

See LETTERS PATENT, s. 39.

9 C. W. N. 566

———s. 596—*Privy Council, appeal to—Leave, application for—Appealable value—Libel suit—Amount of damages claimed, no test—Practice—Enquiry.*—The plaintiff in a suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure. Leave to appeal from an appellate judgment of the High Court dismissing, on the ground of privilege, a suit for damages for libel, was refused in the view that on the finding of the Court of first instance, and not reversed by the Appellate Court, the plaintiff had sustained no substantial damage. Where there is a contest as to the true value of the matter in dispute it has been the invariable practice—a practice sanctioned by the Judicial Committee—to ascertain by evidence and enquiry what the true value is. AMRITA NATH MITTER *v.* ABHOY CHARAN GHOSH (1905)

9 C. W. N. 370

——— s. 620—*Review of judgment—Appeal from order granting a review—Grounds of appeal.*—When an application for review of judgment has been granted for "any other sufficient reason," the sufficiency or otherwise of the reason for granting it is not a ground of appeal within the meaning of

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*concluded*

s 629 of the Code of Civil Procedure *Per* RICHARD, J.—But the fact that the Court fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment. ALI AKBAR v KHURSHED ALI (1905) I. L. R. 27 All. 695

——— s. 622

See APPEAL I. L. R. 32 Calc 57

See BENGAL TENANCY ACT, s 153 9 C. W N 492

See LIMITATION ACT, s 23

See SPECIFIC RELIEF ACT I. L R 29 Bom 213

——— Sch IV, form 130

See COMPROMISE I. L. R. 32 Calc. 561

CIVIL AND REVENUE COURTS

See AGRA TENANCY ACT

CLAIM TO ATTACHED PROPERTY

See CIVIL PROCEDURE CODE

CODE NAPOLEO

See PRIVATE INTERNATIONAL LAW 9 C W N. 384

COGNIZANCE.

See CRIMINAL PROCEDURE CODE

——— *Grant—Grant of village "with wells, tanks and waters" effect of—Irrigation works rights of* GOVERNMENT IN—*Proprietary right not proved by contribution of customary labour*—A grant of village "with all wells, tanks and waters" within the boundaries will not pass to the grantee an artificial water-course then existing, which irrigated the village granted and other lands. Subsequent contribution of labour by the grantee for clearing the channel will not be evidence of proprietary right as such labour is customary and may be enforced under Madras Act I of 1858 The ruling power in India had from the earliest times the conservation and control of works of irrigation and Government has accordingly the right to carry out repairs and improvements in the irrigation works belonging to it, provided that in doing so it does not diminish materially the supply of water to which others may be entitled. AMBALAVANA PANDARA SANNATHI v THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1905) I. L. R. 28 Mad. 539

COMMISSION AGENT

See PRINCIPAL AND AGENT

COMMISSION, ISSUING OF.

See CIVIL PROCEDURE CODE

——— *Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process*—The present appellants obtained a decree against the late head of a mutt and in execution thereof, attached certain gold and silver articles The respondent, the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased, but property belonging to the mutt The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, then applied to the Subordinate Judge to take his evidence on commission stating that he was unable, of his own personal knowledge, to give any evidence material to the questions at issue, and alleging that the appellants were insisting on his appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in a Court as a witness The Subordinate Judge refused to issue a commission On a revision petition being filed, a single Judge of the High Court set aside the order of the Subordinate Judge and ordered the respondent to be examined on commission On an appeal being preferred under Art. 15 of the Letters Patent—*Held*, that an appeal lay. *Held also*, that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the provisions of the Code of Civil Procedure and s. 396 is exhaustive, and provides for all the cases in which the Legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction. *Held further*, that a litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal, which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases. This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its process. In the present case, the appellant's application was not *bonâ fide*, and the respondent's attendance in Court was required not for the purpose of obtaining material evidence, but from other motives, and the order for the issue of a commission was therefore rightly made. VEERABADRAN CHETTY v NATARAJA DESIKAR (1905) I. L. R. 28 Mad 28

——— *Evidence taken on commission, when evidence in suit—Meaning of "forming part of the record" in s 389 of the Civil Procedure Code*—Evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence in the suit by the party, on whose behalf it has been taken *Dwarka Nath v Ganga Dayi*, 8 B L. R 102 *Appendix*; *Nistarini v Nundo Lal*, 3 C W N ccxxxix (239), dissented from. *Kusum Kumari v Satya Ranjan*, 7 C W N 786, followed. HEMANTA KUMARI v. BANKU BEHARI SIKDAR (1905) 9 C W. N 794

COMMITMENT.

See CRIMINAL PROCEDURE CODE.

COMPANY.

See REGISTRATION ACT.
I. L. R. 29 Bom. 19

See STAMP ACT.
I. L. R. 29 Bom. 203

——— *Agreement—Restraint of trade—Contract Act (IX of 1872)—Continuous cause of action—Damages—Transfer of business to a limited Company—Effect.—Held,* that an order directing a Company to furnish an account will not extend beyond or include contributions, which accrued later than the date when the business of such Company was transferred to a limited Company. FRASER & CO. *v.* THE BOMBAY ICE MANUFACTURING COMPANY (1905) . . I. L. R. 29 Bom. 107

——— *Articles of Association—Proxy, qualification of—Meeting of shareholders to alter Memorandum of Association—Validity of votes given by proxy—Act XII of 1895.*—By a power of attorney dated 14th October 1881, some of the shareholders in the appellant Company appointed and authorized certain specified persons, "and all persons who at any time during the continuance of these powers of attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted . . . and in the absence from Bombay" of all the said persons "then the person or persons for the time being holding the procuration of the said firm and managing the said business," to vote as proxy for them at meetings of the Company. Art. 65 of the Articles of Association of the Company provided that "no person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company." At meetings in May and June 1902, the right of proxy was exercised by a person, who had become a shareholder in the Company in March 1889, and was manager of the firm of Wallace & Co., and holding its procuration from 1st April 1889,-but who was neither a member of the firm nor a shareholder in the Company, when the power of attorney was executed. *Held,* by the Judicial Committee (reversing the decision of the High Court), that on the true construction of art. 65 the proxy was not necessarily required to be a shareholder, when the power of attorney was signed: the article was complied with by his being so qualified at the time when he was called upon to act as a proxy. *Held,* also, that although the proxy was not expressly named in the power of attorney, he was sufficiently described in it for all business purposes, and the Articles of Association required nothing more. BOMBAY-BURMA TRADING CORPORATION *v.* DORABJI (1905) . . . . I. L. R. 29 Bom. 126
L. R. 32 I. A. 39

COMPENSATION.

See BOMBAY CITY IMPROVEMENT ACT.

——— *Land Acquisition Act (I of 1894)—Compensation—Market value—Computing, method of.*—In calculating the amount of compensation to be awarded for land compulsorily acquired by Government, it is not permissible to a Judge to take the amount, which the claimant had expended in the purchase and improvement of the land, as if it had been invested on loan since the date of such expenditure at the prevailing rate of interest, and to treat the total amount so arrived at as the market value of the land. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KARTICK CHANDRA GHOSE (1905) . . . . . 9 C. W. N. 655

COMPLAINT.

See CRIMINAL PROCEDURE CODE.

COMPROMISE.

See ADMINISTRATION.

CONFESSION.

See CIRCUMSTANTIAL EVIDENCE (1905).
9 C. W. N. 474

See CRIMINAL BREACH OF TRUST.
I. L. R. 32 Calc. 1085

——— *Accused - Signature—Thumb impression—General Clauses Act (X of 1897), s. 3, cl. 52—Criminal Procedure Code (Act V of 1898), s. 164.*—A thumb-mark affixed to a confession by an accused able to write his name is not a "signature" within the meaning of s. 3, cl. 52 of the General Clauses Act, or s. 164 of the Criminal Procedure Code. SADANANDA PAL *v.* EMPEROR (1905).
I. L. R. 32 Calc. 550

CONSEQUENTIAL RELIEF.

——— *Specific Relief Act (I of 1877), s. 39—Suit for declaration—Cancellation of document—Valuation.*—The plaintiff having sued for the cancellation of a sale-deed framed the prayer in the plaint so as to seek a declaration that the sale-deed was fraudulent and for an order to have it cancelled and a copy sent to the Sub-Registrar as provided by s. 39 of the Specific Relief Act (I of 1877). *Held,* that the suit was one for a declaration with a distinct prayer for consequential relief. *Karam Khan* v. *Daryai Singh, I. L. R. 5 All. 331,* dissented from. PARVATIBAI *v.* VISHVANATH GANESH (1905).
I. L. R. 29 Bom. 207

CONTEMPT OF COURT.

See CIVIL PROCEDURE CODE.

CONTRACT.

See BENGAL DRAINAGE ACT (BENGAL ACT VI OF 1880).

See BENGAL TENANCY ACT, S. 188.

See CONTRACT ACT.

CONTRACT—*continued*

See EVIDENCE.

See MORTGAGE 9 C W N 784
9 C W N 36

——— *Charter party, contract of—Ship-owner's lien—Charterer and sub-charterer—Bill of lading issued to sub-charterer by captain—Captain authorised by shipowner to sign bills of lading "without prejudice to the charter"—Sub-charterer, if bound by charter party—Notice by shipper of charter party—Effect*—Where the captain of a chartered ship was by the terms of the charter party authorised to sign bills of lading on behalf of the shipowners a bill of lading issued by the captain to a sub-charterer entitled the latter to have his goods delivered to him on the terms of the bill of lading irrespective of the charter party, although he had had notice of the charter party *Clink v Aewberry 1 Ch and Fin 283* and *Small v Moates 9 Bing 574* distinguished *Fry v The Chartered Mercantile Bank of India, etc., L R 1 C P 689*; and *Gardener and Sons v Trenchmann L R 15 Q B D 154*, followed A stipulation in the charter party that the bills of lading were to be signed by the captain "without prejudice to the charter" only meant that the rights of the shipowners and the charterers against each other under the charter party were to be preserved. Third parties, to whom the bills of lading were issued, would not thereby be made liable to the conditions stipulated in the charter party *Hansen v Harold Brothers L R 1 Q B 612*, referred to. Notice by a shipper of the charter party has not the effect of incorporating into the bill of lading any terms, which are inconsistent with it and which the captain was not bound to embody in the bill of lading TURNER v HAJI GOOLAM MAHOMED AZAM (1905) 9 C W N 1
L. R. 31 I. A. 223
I. L. R. 28 Bom. 573

——— *Damages, suit for—Breach of contract—Licence to work in forest Construction of contract—Verbal agreement, contemporaneous—Evidence Act (I of 1872), ss 91 and 92 proviso (2)*—One of two defendants in consideration of advances made to him by the plaintiff for the purpose of paying the cost of obtaining the lease of a forest in the name of his son, the other defendant, made an agreement with the plaintiff that "when my son returns I will make him to arrange for you in some way or other (or by any means) to go on working the forest with in the years for which a written permit has been obtained." The son was not a party to the agreement. *Held*, in a suit for damages for breach of contract in not giving the working of the forest to the plaintiff, that on its true construction the agreement contemplated the making of a contract for working the forest only on the return of the son and left all terms to be then arranged; and the plaintiff was entitled only to recovery of the advances with interest. An alleged contemporaneous verbal arrangement as to the rates the plaintiff was to pay for working the forest was held not to be proved; and, quære, whether if proved, evidence of it would have been admissible with reference to s. 91 of the Evidence Act MAUNG SHWE ON v MAUNG TUN GYAW (1905) I. L. R. 32 Calc. 26
sc 9 C W N 147
L. R. 31 I. A. 188

CONTRACT—*concluded.*

——— *Criminal breach of contract—Complaint against workman of failure to complete work—Completion of work by complainant prior to complaint—Maintainability of charge—Act XIII of 1859 s 2*—An employer applied for an order under s 2 of Act XIII of 1859, alleging that a workman had received an advance on account of the work and had failed to perform his part of the contract. Prior to lodging the complaint, the employer had completed the work, and he claimed an order for the repayment of the advance:—*Held* that no order could be made The section only applies, when the work is uncompleted when the complaint is made If the work has been completed, when the complaint is made the Magistrate has no jurisdiction under the section though the employer has a remedy against the workman in the Civil Courts *High Court Proceedings, dated 20th March 1862 (Bivar's 'Law of Offences' 445)*, approved. The offence created by the act is not the neglect or refusal of the workman to perform his contract, but the failure of the workman to comply with an order made by the Magistrate that the workman should repay the money advanced or perform the contract *King-Emperor v Takasi Yakayya, I L R 24 Mad 660*, approved. IN THE MATTER OF ANUSOORI SANYASI (906) (I. L. R. 28 Mad. 37

——— *Jurisdiction—Civil Procedure Code (Act XIV of 1882) s 17 expl iii, cl (2)—Suits arising out of contract Cause of action—Place where the offer is accepted—Contract Act (IX of 1872) ss 8 10 and 25*—A owed B a sum of money for which A gave B at Midnapore a cheque drawn on a firm in Calcutta, in favour of C B took the cheque to C at Purulia and received the amount C presented the cheque at Calcutta, where it was dishonoured On a suit brought by the respresentative of C at Purulia against A for the recovery of the amount paid, the defence was that the Purulia Court had no jurisdiction to entertain the suit. *Held*, that the contract, on which the suit was brought, was completed as soon as the consideration was paid, and as this was done at Purulia, the contract was made at that place within the meaning of s. 17, expl iii, cl. (2) of the Civil Procedure Code, and therefore the Purulia Court had jurisdiction SITARAM MAHTAB v THOMPSON (1906) I. L. R. 33 Calc. 884

CONTRACT ACT (IX OF 1872).

See TRUST DEED 9 C W N 817

——— s. 23—*Immoral consideration, assignment of mortgage for—Right of one in pari delicto to set aside executed contracts—Completed gift cannot, but transfer for consideration may be set aside—Rule as new points in second appeal.*—In 1899 the plaintiff, who was then young and inexperienced, assigned to the defendant, a dancing

CONTRACT ACT (IX OF 1872)—*continued.*

girl, a mortgage for R1,500, the consideration stated in the deed being payments in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff. The plaintiff sued in 1901 to set aside the assignment on the ground that no consideration passed as recited therein, but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The defendant contended that the consideration stated in the deed actually passed, and further that the plaintiff, who admitted that the assignment was for an immoral consideration, could not sue to set it aside. Both the lower Courts found that there was no consideration for the deed and set it aside. On second appeal to the High Court it was contended that the transaction being for an immoral consideration and completely executed, the plaintiff as a person *in pari de icto* could not sue to set it aside. *Held*, that, where the transaction amounted to a voluntary gift, it cannot be set aside; but, where the transaction, though completed, was intended to be for consideration, it can be impeached, if the consideration is immoral, and it *makes no difference whether the transaction is* executed or executory. *Ayerst* v. *Jenkins, L. R. 16 Eq. 272*, distinguished. Whether what has been transferred has been transferred by way of gift or not will depend on the intention of the parties and the facts of the particular case; and the form of the transaction will be material in determining the question. *Phillips* v. *Probyn, 1 Ch. D. 811 at pp. 816 and 817. Held also*, that on the facts, the transaction was between the plaintiff on the one hand and the defendant as the managing member of a joint family of dancing girls consisting of the defendant and her sister on the other. *Kamakshi* v. *Nagarathnam, 5 M. H. C. 161*, referred to. *Held further*, that considering the age and inexperience of the plaintiff and that he had no independent advice, he was not *in pari delicto* A point not taken in the lower Courts, on which no issue was raised, and on which the parties had no opportunity of adducing evidence, cannot be urged in second appeal. THASI MUTHUKANNU v. SHUNMUGAVELU PILLAI (1905).

I. L. R. 28 Mad. 413

——— ss. 23, 27—*Agreement—Restraint of trade—Continuous cause of action—Damages—Transfer of business to a limited Company—Effect.*—In March 1902, certain Ice Manufacturing Companies in Bombay entered into an agreement relating to the manufacture and sale by them of ice. The agreement fixed *inter alia* the minimum price at which ice was to be sold by the parties, the proportion of the manufacture which each was to bear, and the proportion of the profits which each was to receive. It further created a monthly obligation to pay into, and a corresponding right to receive from, a general common fund, the difference, if any, between the profits actually received by the parties and those to which they were, under the agreement, entitled. On a suit being instituted for breach of the agreement, in which damages, sustained prior to and pending the hearing of the suit, were claimed: *Held*, the fact

CONTRACT ACT (IX OF 1872)—*continued.*

that an agreement, if carried out, would limit competition and keep up prices, did not necessarily bring it within the terms of s. 27 of the Contract Act (IX of 1872): to succeed in the defence under that section it was necessary to establish that the agreement was one whereby a person was restrained from exercising a lawful profession, trade, or business of any kind. *Held*, further, that whether or not a High Court in India could award damages, in respect of a continuing cause of action, up to the date of its decree, subsequent successive accruals of an obligation to contribute to a fund could not be treated as falling within that description, and could not be awarded in a suit, where they had accrued due, subsequently to its institution. An order, directing a Company to furnish an account, will not extend beyond or include contributions, which accrued later than the date when the business of such Company was transferred to a limited Company. FRASER AND COMPANY v. THE BOMBAY ICE MANUFACTURING COMPANY (1905).

I. L. R. 29 Bom. 107

——— ss. 23, 65—*An agreement tending to create a monopoly void as opposed to public policy—Madras District Municipalities Act (IV of 1884), s. 191, cl. 2, and s. 362, cl. 2—Construction of statutes, observations on—Refund of money obtained under a void agreement.*—Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under s. 23 of the Indian Contract Act. The power conferred by s. 191, cl. 2 of Madras District Municipalities Act (IV of 1884) on the Chairman of a Municipality to license places for selling meat, etc., only empowers him to consider the propriety of granting or withholding licenses in each case and not to enter into agreements, which must preclude him from considering any such application except from a particular person or persons. A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant, unless it be necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. *Rossi* v. *Edinburgh Corporation, 1905, A. C. 21*, referred to. *Logan* v. *Pyne, 43 Iowa 521; 22 Am. Rep. 261, 262*, followed. Doubts as to the existence of such powers must be resolved against the Corporation and in favour of the public. Where a municipal body receives license fees under a void agreement, it must, when the agreement is set aside, refund the amount so received; and a suit to recover such amount will not be barred by s. 262 (2) of Madras Act IV of 1884. Discretionary power to grant licenses conferred by s. 191, cl. 2, District Municipalities Act, does not empower Municipalities to refuse licenses, unless clear grounds exist for so refusing. SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM (1905).

I. L. R. 28 Mad. 520

——— s. 30,

See EVIDENCE ACT, s. 92.

CONTRACT ACT (IX OF 1872)—*continued*

——— s 69—*Putni talak—Mortgage—Sale in execution—Arrears of rent due previous to sale—First charge*—*A* mortgaged a certain putni taluq to *B* *B* subsequently brought a mortgage suit against *A*, and in execution brought the property to sale and purchased it himself In the meantime the rent due to the zamindar had fallen into arrear, and the zamindar obtained a rent decree, and in execution thereof advertised the putni for sale The mortgagee, to save the property, paid in the amount of the decree and afterwards sued the mortgagor for contribution *Held*, that a mortgagee who purchases property at an execution sale, is under a legal liability to pay the rent due upon the property at the time of purchase, and therefore cannot claim, under s. 69 of the Contract Act, contribution from the mortgagor *Maharani Dasya v Harendra Lall Roy Chowdhry* 1 C W N 453, and *Peary Mohun Mukhopadhya v Sreeram Chandra Bose*, 9 C W N 794, relied on. MANINDRA CHANDRA NANDY v JAMANIR KUMARI (1905)

I. L. R. 32 Calc. 643
s.c. 9 C W N 670

——— s. 70—*Debutter estate—Fees.*—The fees of certain pleaders, who had been engaged by a deceased *shebait* in conducting suits in connection with the *debutter* estate, having been paid by his executors, the *debutter* estate was liable, under s 70 of the Contract Act, to make good such payment Expenses incurred by a *shebait* in criminal cases, in which the *debutter* estate was interested, were charged on the *debutter* estate PEARY MOHAN MOOKERJEA v NARENDRA NATH MOOKERJEA (1905)

9 C W N. 42
s.c. I. L. R. 32 Calc 582

——— s. 70—*Improvements by co-owner—Non-gratuitous act—Contract Act (IX of 1872), s 70—Notice by Municipality*—A notice was issued upon the owners of a *bâri* by the Municipality to effect certain improvements, and *A*, one of the co-sharers, effected the required improvements, for in the event of non-compliance with the notice, the license for holding the *bâri* was threatened to be withdrawn Upon a suit for contribution brought by *A* against *B*, the other co-sharer —*Held* that inasmuch as the property was saved from a forfeiture or disability, which would have injuriously affected its value, *A* in making the improvements did not intend to act gratuitously and was, therefore, entitled to contribution under s. 70 of the Contract Act. *Damodara Mudaliar v The Secretary of State for India*, I L R 18 *Mad* 83 approved JABAO KUMARI v BASANTA KUMAR ROY (1905)

I. L. R. 32 Calc. 374

——— s. 76.

See GUARANTEE

——— s. 130—*Revocation of continuing guarantee—Application to a contract of suretyship under administration bond—Probate and Administration Act (V of 1881), s 78—Administration bond entered into by surety—Allegations by surety against administratrix of waste and mismanagement—Suit by surety against administratrix seeking to be discharged from liability regarding future acts of administratrix—Maintainability*—First defendant was administratrix of her husband's estate. Plaintiff became one of her sureties under s 78 of the Probate and Administration Act Plaintiff brought this suit alleging that first defendant as administratrix was wasting and mismanaging the estate He asked that he might be discharged from his recognisance as a surety as regards future transactions on the part of the administratrix, that in the alternative the administratrix might be directed to complete her administration of the estate, and that his surety bond might then be vacated:—*Held*, that the plaintiff was not entitled to the relief asked for *Held also*, that s 130 of the Contract Act does not apply to the special contract of suretyship, which is entered into by a surety to an administration bond. *Raj Narain Mookerjee v Ful Kumari Debi*, I L R 29 *Calc* 68, not followed. *Bai Somi v Chokshi Ichcardas Mangaldas*, I L R 19 *Bom.* 245, followed and approved. SUBBOTA CHETTY v RAGAMMAL (1905)

I. L. R 28 Mad. 161

CONTRIBUTION.

——— suit for.

See CONTRACT ACT, s. 69.

9 C W. N. 670

——— *Improvements by co-owner—Non gratuitous act—Contract Act (IX of 1872), s 70—Notice by Municipality*—A notice was issued upon the owners of a *bâri* by the Municipality to effect certain improvements, and *A*, one of the co-sharers, effected the required improvements for in the event of non-compliance with the notice the license for holding the *bâri* was threatened to be withdrawn Upon a suit for contribution brought by *A* against *B*, the other co-sharer —*Held*, that inasmuch as the property was saved from a forfeiture or disability, which would have injuriously affected its value, *A* in making the improvements did not intend to act gratuitously and was, therefore, entitled to contribution under s 70 of the Contract Act. *Damodara Mudaliar v The Secretary of State for India*, I L R 18 *Mad* 83, approved JABAO KUMARI v BASANTA KUMAR ROY (1905)

I. L. R. 32 Calc 374

——— *Putni talak—Mortgage—Sale in execution—Arrears of rent due previous to sale—First charge—Contract Act (IX of 1872), s 69*—*A* mortgaged a certain putni taluq to *B* *B* subsequently brought a mortgage suit against *A*, and in execution brought the property to sale and purchased it himself In the meantime the rent due to the zamindar had fallen into arrear, and the zamindar obtained a rent decree, and in execution thereof advertised the putni for sale. The mortgagee, to save the property, paid in the amount of the decree and afterwards sued the mortgagor for

CONTRIBUTION—*concluded.*

contribution. *Held*, that a mortgagee who purchases property at an execution sale is under a legal liability to pay the rent due upon the property at the time of purchase and therefore cannot claim, under s. 69 of the Contract Act, contribution from the mortgagor. *Maharani Jasya v. Harendra Lall Roy Chowdhry*, 1 C. W. N. 458, and *Peary Mohan Mukhopadhya v. Sreeram Chandra Bose*, 9 C. W. N. 791, relied on. MANINDRA CHANDRA NANDY v. JAMAHIR KUMARI (1905).

I. L. R. 32 Calc. 643

CO-OWNER.

See BENGAL TENANCY ACT.

COPYRIGHT ACT (XX OF 1847).

——— ss. 3 and 6—*Order expunging entry under s. 6—The Press and Registration of Books Act (XXV of 1867), s. 18—Catalogue of Books kept at Bombay—Jurisdiction of the Calcutta High Court—Trial on affidavits—Copyright in British territory.*—The High Court of Calcutta has jurisdiction to order the expunging of entries in the catalogue of books kept in Bombay under s. 18 of the Press and Registration of Books Act (XXV of 1867). ISMAIL BIN SHAIK BADAL v. ALI BHOY SARAFALI (1905) . 9 C. W. N. 591

CO-SHARERS.

——— *Co-sharer, right of—Lessee under a co-sharer—Right to quarry—Suit by other owner—Liability to account.*—*B* took a lease of a hill from certain co-sharers of an estate and worked a quarry. *A*, the other co-sharer, brought a suit against *B* claiming an account of all the stones quarried and carried away by him. *Held*, that inasmuch as there was an actual ouster or destruction of the common property by working a quarry, which was the proper and legitimate use of the hill, *A* was not entitled to an account in the absence of any proof that *B* had received more than his just share. *Job v. Potton*, L. R. 20 Eq. 84, distinguished. MAHESH NARAIN v. NOWRAT PATHAK (1905).

I. L. R. 32 Calc. 837

COSTS.

See CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899), ss. 449, 628, 629.
9 C. W. N. 18

See CIVIL PROCEDURE CODE, s. 54.
9 C. W. N. 844

See CRIMINAL PROCEDURE CODE, s. 146.
9 C. W. N. 887

See EXECUTION OF DECREE.
I. L. R. 32 Calc. 494

See INSOLVENCY. . 9 C. W. N. 952

See JURISDICTION. I. L. R. 32 Calc. 602

——— *Transfer of Property Act (IV of 1882), ss. 58, 67, 99—Security for costs of respondents, in appeal before Privy Council—Recovery of costs awarded—Separate suit necessary—Interest on costs.*—*Held*, on the construction of a bond executed by an appellant before the Privy Council as security for the costs of the respondents, that it was a mortgage within s. 58 of the Transfer of Property Act. Costs awarded to the respondents by order of the Privy Council could not therefore be recovered by a sale of the properties comprised in the security otherwise than by instituting a suit under s. 67 of the Transfer of Property Act. No interest on the costs could be claimed when such interest was not allowed by the order of the Privy Council. TOKHAN SINGH v. GIRWAR SINGH (1905) . . . . . 9 C. W. N. 372

——— *Mahomedan Law—Gift—Transfer of possession.*—It was within the discretion of the lower Court to allow separate costs to the first defendant and her minor children. But only one set of costs was allowed in the appeal. KHADIR SULTAN v. RUKHIA SULTAN (1905).

I. L. R. 29 Bom. 894

COURT.

See APPEAL.

COURT-FEES.

See COURT FEES ACT (VII OF 1870).

See JURISDICTION.
I. L. R. 32 Calc. 734

——— *Civil Procedure Code (Act XIV of 1882), ss. 373, 412—Pauper—Suit—Withdrawal of suit with permission to bring a fresh suit—Failure in the suit—Adjudication.*—Where a pauper plaintiff withdraws a suit with permission to bring a fresh suit, he is liable to pay to the Government the Court-fees, which would have been paid by him, if he had not been permitted to sue as a pauper. The words "if the plaintiff fails in the suit" in s. 412 of the Civil Procedure Code (Act XIV of 1882) apply to the withdrawal of a suit under the provisions of s. 373 of the Code. SECRETARY OF STATE v. NARAYAN BALKRISHNA (1905).

I. L. R. 29 Bom. 102

COURT FEES ACT (VII OF 1870).

——— s. 7.

See CIVIL PROCEDURE CODE.
I. L. R. 29 Bom. 96

———s. 7—*Appeal—Preliminary objection.*—A preliminary objection was taken that no appeal lay to the High Court on the ground that the suit had been valued at R610 and was one for a declaration, the prayer for possession being merely consequential. *Held*, overruling the objection, that the suit falls within the scope of s. 7, cl. v of the Court Fees Act (VII of 1870), and that the real value of the property being more than R5,000, an appeal

COURT FEES ACT (VII OF 1870)—*continued*

lay to the High Court. RAI MEHERBAI v MAGANCHAND (1905) . . I. L. R. 29 Bom 86

——— s 7, cl. 11 (e)

——— *Court Fees Act (VII of 1870), s 7, cl 11 (e)—Occupancy holding, suit for possession of*—S 7, cl 11 (*e*) of the Court Fees Act (VII of 1870) does not apply to a suit for possession of an occupancy holding brought by the tenant against the landlord as well as the person whom the landlord has inducted into the land: the Court-fee payable on the plaint in such a case must be computed on the market-value of the property which the plaintiff seeks to recover FURZAND ALI v MOHANTH LAL PURI (1905)
I. L. R. 32 Calc 268

——— s 7, para. IV, cl. (c)—*Specific Relief Act (I of 1877), s 39—Suit for declaration—Cancellation of document—Consequential relief—Valuation*—The plaintiff having sued for the cancellation of a sale-deed, framed the prayer in the plaint so as to seek a declaration that the sale-deed was fraudulent and for an order to have it cancelled and a copy sent to the Sub-Registrar as provided by s 39 of the Specific Relief Act (I of 187.) *Held*, that the suit was one for a declaration with a distinct prayer for consequential relief *Asaram Khan v Daryao Singh (1883), I L R 5 All 331* dissented from The plaint was stamped with a Court-fee stamp of R10 only *Held*, that the case was one falling under s 7, para. 4 cl (c) of the Court Fees Act (VII of 1870), and must be valued accordingly PARVATIBAI v VISHVANATH GANESH (1905) . I L R. 29 Bom. 207

——— s 7, para. IV, cls (c), (d)—*Court Fees Act (VII of 1870), s. 7, para. IV, cls (c) and (d)—Suit for injunction and damages on allegation of possession*—Where a suit was brought by the plaintiff alleging that he was in possession of a certain jungle and that the defendants had interfered with his possession by cutting certain trees and he sought therefore for a declaration of his title to the whole jungle and damages for the trees cut, and an injunction restraining the defendant from cutting any more trees: *Held*, that the suit fell within the provisions of para. IV, cls. (c) and (d) of s 7 of the Court Fees Act and in a case like the present it is not the duty, nor is it within the power, of the Court to ascertain the value of the property for the purposes of jurisdiction, but it should accept the value of the relief stated in the plaint, both for the purposes of Court fee and for determining the jurisdiction of the Court to try the suit HARI SANKAR DUTT v KALI KUMAR PATRA (1905) . . 8 C W N. 690

——— s. 7, cl. V, proviso 3—*Annual survey assessment, which is remitted*—Proviso 3 to cl 5 of s 7 of the Court Fees Act (VII of 1870) has apparently reference only to "the annual survey assessment, which is remitted," that is to say, to

COURT FEES ACT (VII OF 1870)—*continued*

the rate of remission at date of suit. It has, therefore, no reference to remissions previously made, but no longer existing BALAVANT RAMCHANDRA v SECRETARY OF STATE (1905)
I. L. R. 29 Bom. 480

——— s 7 (ix), Sch. I—*Court fee—Suit for redemption of mortgage—Appeal in respect of a specified portion of the sum declared payable for redemption*—In a suit for the redemption of a mortgage the plaintiff obtained a decree for redemption conditional on the payment by him of a sum fixed by the decree The plaintiff appealed upon the ground that such sum was in excess by a specified amount of the sum rightly payable by him for redemption *Held*, that the Court-fee payable on the memorandum of appeal was to be calculated according to the sum, which the appellant claimed to have deducted from his decree; and not, as in the case of a suit for redemption, according to the principal sum secured by the mortgage *Partab Narain Singh v Sita Ram, I L R 13 All 94, quoad hoc*, dissented from NEPAL RAI v DEBI PRASAD (1905)
I. L. R. 27 All. 447

——— s. 10—*Court fee—Abandonment of portion of claim in respect of which the Court-fee was deficient—Dismissal of suit* When a plaintiff in the initial stage of the litigation abandons a portion of his claim, he is not compellable to pay Court fees in respect of the portion abandoned under penalty of having the whole of his suit dismissed RAM PRASAD v BHIMAN (1905) . I. L. R. 27 All. 151

——— s 10 (2) *Court fee—Net profits or market value wrongly estimated—Limitation*—Where action is taken by a Court under s 10 of the Court Fees Act, 1870, the Court is not bound, as in the case of action taken under s 54 of the Code of Civil Procedure, to fix a time within the period of limitation for the suit within which the deficiency in the Court fee must be made good, this section applying to a different stage of the suit from that contemplated by s 54 of the Code of Civil Procedure *Veliya Keezea Vadakgar v Suppannair, I L R 3 Mad 805*, followed *Jairaj Prasad v Rachu Singh, I L R 14 All 65*, and *Balkaran Rai v Govind Nath Tewari, I L R 15 All 129*, distinguished *Durga Singh v Bishesher Dayal, I L R 14 All 218*, referred to HARU LAL v ASI KUNWAR (1905)
I. L. R. 27 All. 197

——— s 11, Sch. II, Art. 17 (vi)—*Court-fee—Suit for sale on a mortgage—Appeal—Claim for future interest*—The plaintiffs, in whose favour a decree for sale on a mortgage had been passed allowing interest up to the date fixed by the decree for payment of the mortgage money, appealed on the ground that interest should have been allowed up to the date of realization *Held*, that the proper Court-fee payable on the memorandum of appeal was ten rupees, as provided by Art. 17 (vi) of the second schedule to the Court Fees Act,

COURT FEES ACT (VII OF 1870)—*continued.*

1870. *Krishnarav* v. *Antaji Virupuksha, 12 Bom. H. C. 227*, followed. BHAWANI PRASAD v. KUTUB-UN-NISSA BIBI (1905). . I. L. R. 27 All. 559

——— s. 17—*Court-fee—"Distinct subjects"—Pre-emption—Suit for pre-emption of two villages out of a larger number conveyed by the same sale-deed.*—The plaintiffs sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid Court-fees on their plaint calculated on five times the aggregate amount of the Government revenue payable by each of the two villages. *Held*, that this was a proper mode of calculation. The two villages were not "distinct subjects" within the meaning of s. 17 of the Court Fees Act, 1870, and Court-fees were not therefore leviable in respect of each village separately. *Chamaili Rani* v. *Ram Dai, I. L. R. 1 All. 552, Mul Chand* v. *Shib Charan Lal, I. L. R. 2 All. 676*, and *Sukru* v. *Tafazzul Husain Khan, I. L. R. 16 All. 401*, followed. DURGA PRASAD v. PURADAR SINGH (1905) . I. L. R. 27 All. 186

——— s. 19D—*Court Fees Amendment Act (XI of 1899), s. 19I—Letters of administration—Limited grant—Trust property—Exemption from probate duty.*—One Harilal died possessed of certain shares in Joint Stock Companies and in the Bank of Bombay valued at R11,980 standing in his name as their registered holder. He left three sons. The sons applied for letters of administration limited to one share only valued at R275 and their application was granted. Subsequently they applied for letters of administration with respect to all the shares, except the one for which limited letters of administration had already been granted and claimed exemption from stamp duty. The question arose as to whether they were entitled to the exemption. *Held*, that the property with respect to which the letters of administration were sought being property held in trust by the deceased for the joint family, the property was entitled to exemption from the Court-fee. *Held*, further, that the exception of trust estates from the payment of *ad valorem* Court-fee is not conditional on the circumstance that there had been a previous grant of probate or letters of administration on which a Court-fee had been paid. The exemption has reference to the character of the property and not to the procedure adopted. *The Collector of Ahmedabad* v. *Savchand, I. L. R. 27 Bom. 140*, disapproved. *In the Goods of Pokurmull Augurwallah, I. L. R. 23 Calc. 980*, followed. COLLECTOR OF KAIRA v. CHUNILAL (1905). I. L. R. 29 Bom. 161

——— s. 28—*Civil Procedure Code, s. 54—Valuation of suit—Limitation—Rules of Court of the 4th April 1894, Rule 12—Duties of Munsarim.*—When reporting as to the sufficiency of the stamp on a plaint it is not necessary for the Munsarim to do more than ascertain whether the plaint is sufficiently stamped according to the plaintiff's valuation of the subject-matter of the suit; his duty does not extend to an examination of the correctness of the plaintiff's valuation. Hence, where a plaint was correctly stamped according to the plaintiff's valuation, and so reported by the Munsarim, but it was afterwards discovered—when the period of limitation for the suit had expired—that the plaintiff's valuation was wrong and the plaint was in fact insufficiently stamped, it was *held* that the suit was barred by limitation. *Muhammad Ahmad* v. *Muhammad Siraj-ud-din, I. L. R. 23 All. 423*, followed. CHATARPAL v. JAGRAM (1905). I. L. R. 27 All. 411

COURT-SALE.

———*Specific performance—Issues—Discretion of Court—Delay—Laches—Specific Relief Act (I of 1877), s. 22—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor.*—The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a chawl and vacant land. The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim. *Held*, that even if a purchaser at a Court-sale purchases without notice, he can only buy what the Court could sell, *i.e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand* v. *Bhaichand, I. L. R. 6 Bom. 193*, followed. PEER MAHOMED v. MAHOMED EBRAHIM (1905) I. L. R. 29 Bom. 234

CREDITORS.

See ADMINISTRATION.

CRIMINAL APPEAL.

See PRACTICE . I. L. R. 32 Calc. 178

CRIMINAL BREACH OF CONTRACT.

See CONTRACT.

CRIMINAL BREACH OF TRUST.

See CRIMINAL PROCEDURE CODE, s. 234. I. L. R. 27 All. 69

See PENAL CODE, s. 405. I. L. R. 27 All. 28, 260

——— *Charge—Misjoinder of charges—Statement by accused—Confession—Admission—Evidence, admissibility of—Criminal Procedure Code (Act V of 1898), ss. 164, 202, 222, 234, 364.*—An accused was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the

CRIMINAL BREACH OF TRUST—*continued*

persons from whom he collected them He was not charged with three offences but with one offence under s 409 of the Penal Code, and was convicted of one offence and sentenced to one term of imprisonment:—*Held*, that the charge as framed was not contrary to law, it being in accordance with ss 222, sub-s (2), and 234 of the Code of Criminal Procedure *Emperor* v *Gulzari Lall, I L R 24 All 254; Samiruddin Sarkar* v *Bibaran Chandra Ghose, I. L R 31 Calc 928*, and *Emperor* v *Ishtiaq Ahmad, I L R 27 All 69*, referred to *Subrahmania Ayyar* v *King-Emperor, I L R 25 Mad 61*, distinguished. An admission or confession made before a Magistrate carrying on an inquiry under s. 202 of the Criminal Procedure Code is not a statement recorded under s. 164 or 364 of the Code and is therefore not admissible in evidence against the accused without further proof SAT NARAIN TEWARI v EMPEROR (1905) I. L. R. 32 Calc. 1085

CRIMINAL COURT.

——— *Jurisdiction—Deputy Magistrate—District Magistrate—Subordinate Court—Cognizance—Process.*—Where on a police report cognizance was taken by a Joint Magistrate (acting for the District Magistrate) of an offence alleged to have been committed by several persons, and the case was made over to a Deputy Magistrate for disposal, and the Deputy Magistrate tried and convicted some of the accused persons mentioned in the original complaint, and on his refusal to proceed against the rest of the accused, the Joint Magistrate ordered a summons to issue against them: *Held, per* HENDERSON, *J.*—The following propositions may be deduced from the authorities quoted: (*i*) That the order of the Deputy Magistrate refusing to issue process on the ground that it was unnecessary to take further action, amounted to a discharge, (*ii*) that the order making over the case to the Deputy Magistrate for disposal was an order making over the whole case mentioned in the original police report to the Deputy Magistrate; (*iii*) that until the District Magistrate had withdrawn the case so made over from the file of the Deputy Magistrate to that of his own Court, he had no power to make any order save an order for further enquiry under s 437 of the Criminal Procedure Code *Held, per* GHOSE, *J.*, that the case having been transferred to the Deputy Magistrate, that officer alone had jurisdiction to deal with any application for a summons, until the case was withdrawn from his cognizance; the order of the Joint Magistrate to issue a summons was, therefore, not warranted by law *Golapdi Sheikh* v *Queen Empress, I L R 27 Calc 970, Moul Singh* v *Mahabir Singh, 4 C. W N 242*, and *Radhalullaw Roy* v *Benode Behari Chatterjee, I L R 30 Calc 342*, referred to. AZAR LAL KHARER v EMPEROR (1905) I. L. R. 32 Calc 783 s.c. 9 C. W. N. 810

CRIMINAL MISAPPROPRIATION.

See CRIMINAL PROCEDURE CODE.

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1868)

——— ss. 4 (o) and 28 (2) and Sch. II.

See OFFENCE . I. L. R. 32 Calc. 816

——— ss. 87, 88 and 89—*Absconding offender—Sale of property of absconder—Illegal sale—Suit to recover property sold from auction purchaser—Jurisdiction*—Where the property of an absconding offender was attached and sold by a Court purporting to act under s 88 of the Code of Criminal Procedure and it turned out that the procedure culminating in the sale was irregular and illegal, It was *Held* that the Civil Courts had jurisdiction to entertain a suit by the owner of property so sold to recover the same in the hands of a purchaser. MIAN JAN v ABDUL (1905) . I. L. R. 27 All 572

——— ss. 100 (b), 195.

See SANCTION FOR PROSECUTION I. L. R. 32 Calc. 469

——— ss. 100, 562.

See CRIMINAL PROCEDURE CODE, s 476 I. L. R. 32 Calc. 1030

——— s. 107—*Wrongful act—Putni sale—Reg VIII of 1819—Dar-putnidar under the defaulting putnidar continuing the purchaser*—A *putni* taluk was sold under Reg VIII of 1819 The revenue authorities and the zamindars did everything that was necessary for them to do under the regulation to put the purchaser in possession Nevertheless a *dar-putnidar* under the defaulting *putnidar* continued to be in possession and insisted upon collecting rents from the raiyats. *Held*, that such act on the part of the *dar-putnidar* was wrongful and he was rightly bound down to keep the peace under s 107 of the Criminal Procedure Code, when it was found that his act was likely to cause a breach of the peace The fact that the *dar-putnidar* had brought a suit to set aside the sale made no difference, inasmuch as the effect of the *putni* Regulation is to render such act unlawful, until such time as the sale shall have been set aside BISHARAT ALI v UMAPADA BANERJI (1905) . . . . 9 C. W. N. 792

——— s. 107—*Security to keep the peace—Measurement of land by co-sharer landlord—Legality—Bengal Tenancy Act (VIII of 1885), ss 90, 188.*—When one of several co-sharer landlords sought to make a measurement of lands contrary to the provisions of ss 90 and 188 of the Bengal Tenancy Act, the other co-sharer landlords were justified in objecting and, where no force had been used by them, they ought not to have been bound over to keep the peace under s 107 of the Criminal Procedure Code, inasmuch as any likelihood of a breach of the peace was really due to the action of their co-sharer BHARATARAN GHOSE v BANKUTESH LAL MITRA (1905) 9 C. W. N. 618

——— ss 107 and 110

See REVIEW.

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT V OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— ss. 107, 114, 115, 125, 144, 145.

See SECURITY TO KEEP THE PEACE.
I. L. R. 32 Calc. 948

——— ss. 107, 114, 115, 496, 498—*Custody, detention in—Security for keeping the peace—Arrest—Bail, right to—Power to re-arrest.*—Where proceedings have been instituted against a person under s. 107 of the Criminal Procedure Code it is only in the special circumstances referred to in clauses (3) and (4) of that section that the law empowers a Magistrate to detain the person in custody, until the completion of the inquiry. S. 496 of the Code is imperative, and under its provisions the Magistrate is bound to release such person on bail or recognizances. *Quære*, whether the proviso to s. 114 of the Code empowers a Magistrate to re-arrest a person, who has already appeared and been admitted to bail. RAGHUNANDAN PERSHAD AND OTHERS *v.* EMPEROR (1905).
I. L. R. 32 Calc. 80

——— ss. 107, 117 (4)—*Security to keep the peace—Joint enquiry—Association—Persons acting as servants, if should be bound down—Prejudice.*—Where all the acts alleged against certain persons against whom a joint enquiry under s. 107 of the Code of Criminal Procedure was instituted were found to have been done by them for the benefit of their common master, *viz.*, with a view to extort *kabuliats* at enhanced rates from his tenants, *Held* (HENDERSON, *J.*, *dissentiente*), that, although each of the acts alleged was not done by all of them together, yet they were associated together within the meaning of s. 117, sub-s. (4), so as to justify a joint enquiry. *Held further*, that they could be proceeded against under s. 107 of the Code of Criminal Procedure notwithstanding that the acts imputed to them were committed by them not as individual members of a society, but as servants of another person. SRIKANTA NATH SAHA *v.* EMPEROR (1905).
9 C. W. N. 895

——— ss. 107, 118 and 406—*Security for keeping the peace—Appeal.—Held*, that no appeal will lie from an order under s. 118 of the Code of Criminal Procedure requiring security to be furnished for keeping the peace. CHET RAM, IN THE MATTER OF THE PETITION OF (1905). I. L. R. 27 All. 623

——— ss. 107, 145—*Dispute relating to possession of land—Breach of the peace, likelihood of—Choice of proceedings.*—When it was found that certain persons had threatened to use violence upon the complainant, if he should go upon land of which he was in possession and were endeavouring to oust him from that land, the Magistrate was justified in instituting proceedings under s. 107 of the Code of Criminal Procedure. The jurisdiction of the Magistrate to proceed under s. 107 is not ousted by the fact that it appeared in the course of the inquiry that the dispute was one relating to the possession of land and that the apprehended breach of the peace was in consequence of that dispute—although ordinarily the more appropriate procedure in such cases is that provided by Chap. XII of the Criminal Procedure Code. JAFAR MONDAL *v.* JABIBULLAH SAHA (1905).
9 C. W. N. 551

——— s. 110—*Security for good behaviour—The taking of sureties without personal bonds or recognizances illegal.—Held*, that there is no provision of law by which a person required to find security to be of good behaviour can be called upon to provide sureties for his good behaviour without at the same time entering into his own bond for that purpose. EMPEROR *v.* UDMI (1905) . I. L. R. 27 All. 262

——— ss. 110, 112, 190, 191 and 526—*Transfer—Security for good behaviour.*—Where a Magistrate refused to admit to bail a person against whom proceedings were pending under s. 110 of the Code of Criminal Procedure on the ground that "the accused is said to be a dangerous and violent man, who might use his liberty for the purpose of intimidating witnesses," the High Court declined to direct a transfer of the proceedings. Magistrates are left a very wide discretion as to the kind of information upon which they may act in instituting proceedings under Chapter VIII of the Code, and they are not bound to disclose its source. The provisions of s. 19 (c) and s. 191 do not apply to such proceedings. MITHU KHAN, IN RE (1905). I. L. R. 27 All. 172

——— ss. 110 and 118—*Security for good behaviour—Delegation of inquiry into sufficiency of security.—Held*, that it is not competent to a Magistrate, who has passed an order under s. 118 of the Code of Criminal Procedure, to delegate to another officer the duty of inquiring into the sufficiency of the security tendered, but such inquiry must be made by the Court by which the original order was passed. *Queen-Empress* v. *Pirthi Pal Singh*, *Weekly Notes*, *1898*, *p. 154*, and *Emperor* v. *Tota*, *I. L. R. 25 All. 272*, followed. EMPEROR *v.* BALWANT (1905).
I. L. R. 27 All. 293

——— s. 125—*District Magistrate's power to cancel bonds for keeping the peace.*—The jurisdiction conferred by s. 125 of the Criminal Procedure Code is not an appellate or revisional, but an original jurisdiction in the exercise of which the District Magistrate may cancel any bond for keeping the peace, when it is made to appear that by reason of circumstances arising subsequent to the date of the execution of the bond the continuance of the latter is not necessary. An order for cancelling a bond cannot be made before it has been executed. No appeal lies to the District Magistrate in the case of orders to keep the peace; but in a proper case, he may make a reference to the High Court under the provisions of s. 438 of the Criminal Procedure Code, BARPA CHANDRA DEY *v.* JANMENJOY DUTT (1905).
9 C. W. N. 860

——— s. 133.

See PUBLIC NUISANCE.
I. L. R. 32 Calc. 930

CRIMINAL BREACH OF TRUST—continued

persons from whom he collected them He was not charged with three offences but with one offence under s 409 of the Penal Code, and was convicted of one offence and sentenced to one term of imprisonment —*Held*, that the charge as framed was not contrary to law, it being in accordance with ss 222, sub-s (2), and 234 of the Code of Criminal Procedure. *Emperor* v *Gulzari Lall*, I L R 24 All 254; *Samiruddin Sarkar* v *Nibaran Chandra Ghose*, I L R 31 Calc 923, and *Emperor* v *Ishhaq Ahmad*, I L R 27 All 69, referred to *Subrahmania Ayyar* v *King-Emperor*, I L R 25 Mad 61, distinguished An admission or confession made before a Magistrate carrying on an inquiry under s 202 of the Criminal Procedure Code is not a statement recorded under s 164 or 364 of the Code and is therefore not admissible in evidence against the accused without further proof SAT NARAIN TEWARI v EMPEROR (1905)
I. L. R. 32 Calc 1085

CRIMINAL COURT.

——— *Jurisdiction—Deputy Magistrate—District Magistrate—Subordinate Court—Cognizance—Process*—Where on a police report cognizance was taken by a Joint Magistrate (acting for the District Magistrate) of an offence alleged to have been committed by several persons, and the case was made over to a Deputy Magistrate for disposal, and the Deputy Magistrate tried and convicted some of the accused persons mentioned in the original complaint, and on his refusal to proceed against the rest of the accused, the Joint Magistrate ordered a summons to issue against them *Held*, *per* HENDERSON, J —The following propositions may be deduced from the authorities quoted: (i) That the order of the Deputy Magistrate refusing to issue process on the ground that it was unnecessary to take further action, amounted to a discharge, (ii) that the order making over the case to the Deputy Magistrate for disposal was an order making over the whole case mentioned in the original police report to the Deputy Magistrate, (iii) that until the District Magistrate had withdrawn the case so made over from the file of the Deputy Magistrate to that of his own Court, he had no power to make any order save an order for further enquiry under s 437 of the Criminal Procedure Code *Held*, *per* GUPTE, J., that the case having been transferred to the Deputy Magistrate, that officer alone had jurisdiction to deal with any application for a summons, until the case was withdrawn from his cognizance; the order of the Joint Magistrate to issue a summons was, therefore, not warranted by law *Golapdi Shekh* v *Queen Empress* I L R 27 Calc 979, *Moul Singh* v *Mahabir Singh*, 4 C W N 242, and *Radhakullun Roy* v *Benode Behari Chatterjee*, I L R 30 Calc 449, referred to AJAB LAL KUBURIA v EMPEROR (1905)
I. L. R 32 Calc. 783
s.c. 9 C. W. N. 810

CRIMINAL MISAPPROPRIATION.

See CRIMINAL PROCEDURE CODE.

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882, ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869).

——— ss. 4 (o) and 29 (2) and Sch. II.

See OFFENCE I. L. R. 32 Calc. 816

——— ss. 87, 88 and 89—*Absconding offender—Sale of property of absconder—Illegal sale—Suit to recover property sold from auction purchaser—Jurisdiction*—Where the property of an absconding offender was attached and sold by a Court purporting to act under s 88 of the Code of Criminal Procedure and it turned out that the procedure culminating in the sale was irregular and illegal, it was *held* that the Civil Courts had jurisdiction to entertain a suit by the owner of property so sold to recover the same in the hands of a purchaser MIAN JAN v. ABDUL (1905) . I. L. R. 27 All 572

——— ss 100 (b), 195.

See SANCTION FOR PROSECUTION
I. L. R. 32 Calc. 469

——— ss. 200, 562.

See CRIMINAL PROCEDURE CODE, s 476
I. L. R. 32 Calc. 1030

——— s. 107—*Wrongful act—Putni sale—Reg VIII of 1819—Dar putnidar under the defaulting putnidar resisting the purchaser*—A *putni* taluk was sold under Reg VIII of 1819 The revenue authorities and the zamindars did everything that was necessary for them to do under the regulation to put the purchaser in possession Nevertheless a *dar-putnidar* under the defaulting *putnidar* continued to be in possession and insisted upon collecting *rents from the ryots* *Held*, that such act on the part of the *dar-putnidar* was wrongful and he was rightly bound down to keep the peace under s 107 of the Criminal Procedure Code, when it was found that his act was likely to cause a breach of the peace The fact that the *dar-putnidar* had brought a suit to set aside the sale made no difference, inasmuch as the effect of the *putni* Regulation is to render such act unlawful, until such time as the sale shall have been set aside BISHARAT ALI v UMAPADA BANERJI (1905) . . . 9 C W. N. 702

——— s. 107—*Security to keep the peace—Measurement of land by co-sharer landlord—Legality—Bengal Tenancy Act (VIII of 1885), ss 90, 188*—When one of several co-sharer landlords sought to make a measurement of lands contrary to the provisions of ss 90 and 188 of the Bengal Tenancy Act, the other co-sharer landlords were justified in objecting and, where no forces had been used by them, they ought not to have been bound over to keep the peace under s 107 of the Criminal Procedure Code, inasmuch as any likelihood of a breach of the peace was really due to the action of their co-sharer BHAGATARAN GHOSE v BANKUTESH LAL MITRA (1905)
9 C. W. N 618

——— ss. 107 and 110

See REVIEW

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT V OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— ss. 107, 114, 115, 125, 144, 145.

See SECURITY TO KEEP THE PEACE.

I. L. R. 32 Calc. 948

——— ss. 107, 114, 115, 496, 498—*Custody, detention in—Security for keeping the peace—Arrest—Bail, right to—Power to re-arrest.*—Where proceedings have been instituted against a person under s. 107 of the Criminal Procedure Code it is only in the special circumstances referred to in clauses (*3*) and (*4*) of that section that the law empowers a Magistrate to detain the person in custody, until the completion of the inquiry. S. 496 of the Code is imperative, and under its provisions the Magistrate is bound to release such person on bail or recognizances. *Quære*, whether the proviso to s. 114 of the Code empowers a Magistrate to re-arrest a person, who has already appeared and been admitted to bail. RAGHUNANDAN PERSHAD AND OTHERS *v.* EMPEROR (1905).

I. L. R. 32 Calc. 80

——— ss. 107, 117 (*4*)—*Security to keep the peace—Joint enquiry—Association—Persons acting as servants, if should be bound down—Prejudice.*—Where all the acts alleged against certain persons against whom a joint enquiry under s. 107 of the Code of Criminal Procedure was instituted were found to have been done by them for the benefit of their common master, *viz.*, with a view to extort *kabuliats* at enhanced rates from his tenants. *Held* (HENDERSON, *J.*, *dissentiente*), that, although each of the acts alleged was not done by all of them together, yet they were associated together within the meaning of s. 117, sub-s. (*4*), so as to justify a joint enquiry. *Held further*, that they could be proceeded against under s. 107 of the Code of Criminal Procedure notwithstanding that the acts imputed to them were committed by them not as individual members of a society, but as servants of another person. SRIKANTA NATH SAHA *v.* EMPEROR (1905).

9 C. W. N. 895

——— ss. 107, 118 and 406—*Security for keeping the peace—Appeal.—Held*, that no appeal will lie from an order under s. 118 of the Code of Criminal Procedure requiring security to be furnished for keeping the peace. CHET RAM, IN THE MATTER OF THE PETITION OF (1905). I. L. R. 27 All. 623

——— ss. 107, 145—*Dispute relating to possession of land—Breach of the peace, likelihood of—Choice of proceedings.*—When it was found that certain persons had threatened to use violence upon the complainant, if he should go upon land of which he was in possession and were endeavouring to oust him from that land, the Magistrate was justified in instituting proceedings under s. 107 of the Code of Criminal Procedure. The jurisdiction of the Magistrate to proceed under s. 107 is not ousted by the fact that it appeared in the course of the inquiry that the dispute was one relating to the possession of land and that the apprehended breach of the peace was in consequence of that dispute—although ordinarily the more appropriate procedure in such cases is that provided by Chap. XII of the Criminal Procedure Code. JAFAR MONDAL *v.* JARIBULLAH SAHA (1905).

9 C. W. N. 551

——— s. 110—*Security for good behaviour—The taking of sureties without personal bonds or recognizances illegal.—Held*, that there is no provision of law by which a person required to find security to be of good behaviour can be called upon to provide sureties for his good behaviour without at the same time entering into his own bond for that purpose. EMPEROR *v.* UDMI (1905) . I. L. R. 27 All. 262

——— ss. 110, 112, 190, 191 and 526—*Transfer—Security for good behaviour.*—Where a Magistrate refused to admit to bail a person against whom proceedings were pending under s. 110 of the Code of Criminal Procedure on the ground that "the accused is said to be a dangerous and violent man, who might use his liberty for the purpose of intimidating witnesses," the High Court declined to direct a transfer of the proceedings. Magistrates are left a very wide discretion as to the kind of information upon which they may act in instituting proceedings under Chapter VIII of the Code, and they are not bound to disclose its source. The provisions of s. 19 (*c*) and s. 191 do not apply to such proceedings. MITHU KHAN, IN RE (1905). I. L. R. 27 All. 172

——— ss. 110 and 118—*Security for good behaviour—Delegation of inquiry into sufficiency of security.—Held*, that it is not competent to a Magistrate, who has passed an order under s. 118 of the Code of Criminal Procedure, to delegate to another officer the duty of inquiring into the sufficiency of the security tendered, but such inquiry must be made by the Court by which the original order was passed. *Queen-Empress* v. *Pirthi Pal Singh, Weekly Notes, 1898, p. 154*, and *Emperor* v. *Tota, I. L. R. 25 All. 272*, followed. EMPEROR *v.* BALWANT (1905).

I. L. R. 27 All. 293

——— s. 125—*District Magistrate's power to cancel bonds for keeping the peace.*—The jurisdiction conferred by s. 125 of the Criminal Procedure Code is not an appellate or revisional, but an original jurisdiction in the exercise of which the District Magistrate may cancel any bond for keeping the peace, when it is made to appear that by reason of circumstances arising subsequent to the date of the execution of the bond the continuance of the latter is not necessary. An order for cancelling a bond cannot be made before it has been executed. No appeal lies to the District Magistrate in the case of orders to keep the peace; but in a proper case, he may make a reference to the High Court under the provisions of s. 438 of the Criminal Procedure Code, BARPA CHANDRA DEY *v.* JANMENJOY DUTT (1905).

9 C. W. N. 860

——— s. 133.

See PUBLIC NUISANCE.

I. L. R. 32 Calc. 930

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882, ACT X OF 1872, ACT XXV OF 1861, ACT VIII OF 1869)—*continued*

——— s 133—*Order directing removal of certain buildings—Obstruction to public way—Bona fide question of title—Procedure—Jury reference to—Question for their decision—Magistrate, duty of—Misdirection*—A Magistrate acting under s. 133 of the Code of Criminal Procedure should first of all satisfy himself as to the *bonâ fides* of the claim, if any, and then determine whether the parties should be referred to the Civil Court *Preo Nath Dey v Gobordhone Malo, I L R 20 Calc 279; Queen Empress v Bisseesur Sahu, I L R 17 Calc 562*, referred to When a jury is claimed and appointed, they have only to try the question whether the Magistrate's conditional order is reasonable and proper Where the question referred to the jury was "whether there was a public right of way: *Held*, that that was not a proper reference MATUK DHARI TEWARI v HARI MADHAV DAS (1905) 9 C W N 72

——— ss. 133, 342, 488—"*Accused person*"—*Person against whom proceeding under s 133 taken—Examination on oath—False evidence—Perjury—Penal Code (Act XLV of 1860), s 193*—A person against whom proceedings under s 133 of the Criminal Procedure Code are taken is not an accused person and he commits an offence under s 193 of the Penal Code, if he makes a false statement during his examination on oath in the proceedings *The Queen Empress v Mona Puna, I L R 16 Bom 661; Jhuja Singh v Queen Empress, I L R 23 Calc 493*, and *Queen Empress v Mutasaddi Lal, I L R 21 All 107*, distinguished HIRANANDA OJHA v EMPEROR (1905) 9 C W N 953

——— s. 144.

See BREACH OF THE PEACE
I L R. 32 Calc 154, 783

See MAGISTRATE
I. L. R. 32 Calc. 935

——— s 144—*Penal Code (Act XLV of 1860), s 188—Collection of rent—Disobedience of order*—An order cannot be passed under s 144 of the Code of Criminal Procedure prohibiting a person from collecting rents from tenants Disobedience of such an order would not render a person liable to prosecution under s 188 of the Penal Code PREM CHAND SINGH ROY v DHARMADASS SIXON ROY (1905) . . 9 C W N 382

——— s. 144—*Jurisdiction—Tenant—Sub tenant—Omission to state material facts in the order*—Before a Magistrate can take action under s 144 of the Criminal Procedure Code he must be of opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order Where, therefore a Magistrate passed an order directing the second party not to interfere with the first party in the cultivation of his *khas* lands or the collection of rents from his under tenants, and it did not appear from the proceedings that he was of opinion that immediate prevention or speedy remedy was necessary and the order made did not state the material facts of the case *Held*, that the order was bad and must be set aside. KABOOLAL SAJAWAN v. SHYAM (1905) . . I. L. R. 33 Calc 935 9 C W. N. 864

——— s. 144—*Irrevocable order*—An order for division of crops between the tenants and a rival zamindar does not come within the purview of s 144 of the Criminal Procedure Code; nor is a Magistrate empowered to make an order of an irrevocable nature under that section UMATAL FATIMA v NEMAI CHARAN BANERJEE (1905) I. L. R. 33 Calc. 154

——— s 145.

See MAGISTRATE
I. L. R. 32 Calc. 287

See PARTNERSHIP PROPERTY
I. L. R 32 Calc. 248

——— s 145—*Jurisdiction of Magistrate—Parties—Manager—Title—Possession—Encroachment*.—The fact that the manager, and not his employer, the zamindar, has been made a party to a proceeding under s. 145 of the Criminal Procedure Code is a mere irregularity, or at most an error of law, which does not affect the Magistrate's jurisdiction. *Dhondhas Singh v Follet, I L R 31 Calc 48*, referred to. Where a party claims no easement or customary right, any intermittent acts of encroachment on his part, such as cutting a few trees or filching some underwood, would not affect the title or possession of the superior landlord *Framji Cursetji v Gocouldas Madhowji, I. L R 16 Bom 339; Agency Company v Short, L R 13 App Cas 793*, referred to BHOLANATH SINGH v WOOD (1905) I L. R. 32 Calc 287

——— s. 145—*Process—Magistrate—Extraordinary jurisdiction of the High Court—Prejudice—Charter Act (24 and 25 Vict, c 104), s 15*—It is not obligatory on a Magistrate to assist parties to a proceeding under s. 145 of the Criminal Procedure Code in producing their witnesses, and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence. *Surendra Narain Singh v Bhabani Pres Barmani, I L. R 11 Calc 762, Ram Chandra Das v Monohar Roy, I L R 21 Calc. 29; Madhab Chandra Tanti v Martin, I L R 30 Calc 508, note Surya Kanta Acharjee v Hem Chandra Chowdhury, I L R 30 Calc 508*, and *Radhanath Singh v Mangal Gareri, 2 C L J 86, note*, dissented from *Manmatha Nath Mitter v Baroda Prasad Roy, I L R 31 Calc 685*, referred to. The powers of superintendence under s 15 of the Charter Act should, in cases under s 145 of the Criminal Procedure Code, be exercised with caution, and the Court ought not to interfere, un

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

less satisfied that the party has been prejudiced by the proceedings in the Court below. *Sukh Lal Sekh* v. *Tara Chand Ta*, *9 C. W. N. 1045*, followed. Where a party had obtained summonses upon his witnesses, and on the failure of some of them to appear, applied for fresh summonses against them, which the Magistrate refused, and where it was further alleged that he had refused to allow a witness to prove certain documents. *Held*, that there was nothing to show that the absent witnesses could not have been made to attend without the assistance of the Court, nor whether they were material witnesses, nor that any questions were put to the witness, which were improperly disallowed, and that the party was not, therefore, shown to have been prejudiced. TARA PADA BISWAS *v.* NURUL HUQ (1905) . . I. L. R. 32 Calc. 1093

——— s. 145, cl. (1)—*Grounds to satisfy Magistrate as to necessity of taking proceedings—It must be specifically stated in the initial order—Police-report, reference to—Effect.*—When the initial order made under s. 145, cl. (1) of the Criminal Procedure Code does not state in express terms the grounds upon which the Magistrate is satisfied that a dispute likely to cause a breach of the peace existed, but such grounds appear in the police-report on which the order is founded and to which it makes reference,—there is substantial compliance with the provisions of s. 145, cl. (1) of the Criminal Procedure Code. KHOSH MAHOMED SIRCAR *v.* NAZIR MAHOMED (1905) . . . . 9 C. W. N. 1065

——— s. 145, cls. (1), (6).

See JURISDICTION.

I. L. R. 32 Calc. 552, 602

See WITNESSES.

I. L. R. 32 Calc. 1093

——— s. 145, cl. (1), (6)—*Magistrate—Omission to record initiatory order—Arbitration, reference to.*—Where proceedings under s. 107 of the Criminal Procedure Code were instituted against the parties and on their appearance the Magistrate, considering that the dispute came within s. 145 of the Code, treated the case as one instituted under the latter section, and adjourned it for the evidence of their respective claims to actual possession, without recording an order under sub-s. (*1*) :—*Held*, that the drawing up of a formal order under sub-s. (*1*) was absolutely necessary to the initiation of proceedings under s. 145 and the omission to do so rendered them bad for want of jurisdiction. S. 145 does not contemplate that the question of actual possession should be delegated, even by the consent of the parties, to arbitration. It directs the Magistrate himself to receive the evidence produced by the parties, and to come to a decision in consideration thereof. BANWARI LALL MUKERJEE *v.* HRIDAY CHAKRAVARTI (1905).

I. L. R. 32 Calc. 552

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— s. 145, cls. (3) and (4)—*Possession enquiry as to—Notice—Local service—Condition precedent to exercise of jurisdiction—Revision by High Court.*—The publication of a notice locally under sub-s. (3) of s. 145 of the Criminal Procedure Code is a condition precedent to the exercise of a Magistrate's jurisdiction in an enquiry as to possession under cl. (4) of that section. *Jane Manjhi* v. *Maniruddin*, *8 C. W. N. 590*, approved. NAWAB KHAJAH SOLEMOLLAH BAHADUR *v.* ISHAN CHANDRA DAS SARKAR (1905) 9 C. W. N. 909

——— s. 145, cl. (I), s. 148.

See JURISDICTION OF MAGISTRATE.

I. L. R. 32 Calc. 771

——— s. 145, cl. (1), s. 148—*Jurisdiction of Magistrate—Dispute relating to a kutcherry—Initiatory order—Omission to state the grounds of the apprehension of a breach of the peace—Reference to information obtained in a local inquiry not recorded—Order as to costs.*—If the Magistrate omits in the initiatory order under s. 145, cl. (1) of the Criminal Procedure Code to state the grounds of his being satisfied as to the likelihood of a breach of the peace, the final order is without jurisdiction. Where, therefore, the initiatory order merely referred to some information which was obtained during the course of a local inquiry held by himself, but had not been reduced into writing: *Held*, that the proceedings under s. 145 were bad in law. In a case initiated upon a police report or other information, which has been reduced into writing, reference can be made to the materials upon which the Magistrate acted, to ascertain whether there were in fact grounds upon which he might have acted, but even then it is his duty to state the grounds, upon which he was satisfied that there was a likelihood of a breach of the peace. *Queen-Empress* v. *Gobind Chandra Das*, *I. L. R. 20 Calc 520*; *Dhanput Singh* v. *Chatterput Singh*, *I. L. R. 20 Calc. 513*; *Mohesh Sowar* v. *Narain Bag*, *I. L. R. 27 Calc. 981*, and *Jogomohan Pal* v. *Ram Kumar Gope*, *I. L. R. 28 Calc. 416*, referred to. NITTYANAND ROY *v.* PARESH NATH SEN (1905) . . . . I. L. R. 32 Calc. 771
s.c. 9 C. W. N. 621

——— s. 145, sub-s. (3)—*Local publication of proceeding—Omission—High Court's power to interfere—Charter Act, s. 15—Magistrate's jurisdiction—Prejudice.*—The High Court's power of interference under s. 15 of the Charter Act is discretionary, and ought, in relation to cases under s. 145 of the Criminal Procedure Code, to be exercised with every caution. In a case in which the Court has proceeded with irregularity, the High Court should not interfere, unless it can be shown that some one has been materially prejudiced by such irregularity. Where, however, the Subordinate Court has acted without jurisdiction, the High Court will interfere. When the provisions of sub-s. (1) of s. 145 of the Criminal Procedure Code are complied

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872, ACT XXV OF 1861, ACT VIII OF 1869)—*continued*

with, the Magistrate acquires jurisdiction to deal with the case and the omission to have a copy of his order locally published under sub-s (3) of the section does not deprive him of that jurisdiction. MACLEAN, C.J., RAMPINI, PRATT and HENDERSON JJ —The provisions as to local publication in sub-s. (3) is directory and a matter of procedure only It is nevertheless the duty of the Magistrates to strictly comply with it *Jann Manjhi* v *Manirudin*, 8 C W N 590, and *Nawab Solemollah* v. *Jahan Chandra Das*, 9 C W N 909 disapproved GHOSE, J —The procedure laid down in sub s. (3) is mandatory and a Magistrate acts illegally in the exercise of his jurisdiction by omitting to follow this procedure. The High Court in such a case may interfere under the Charter Act, but it is not obligatory on the High Court to interfere, and it may refuse to interfere, where no prejudice has been occasioned or was likely to be occasioned by the omission SUKH LAL SHEIKH v TARA CHAND TA (1905)
9 C W N. 1048

——— ss. 145, 146

See JURISDICTION

See LANDLORD AND TENANT
I L R 32 Calc 796, 856

——— s. 145—*Immoveable property, dispute as to—Possession—Title—Costs—Damages*—Proceedings under s 145 of the Criminal Procedure Code were instituted with reference to a bandh erected by the second party upon land claimed both by the first and second parties The Magistrate treated the case as if it were solely one of title and made an order directing the removal of the *bandh*, and he further awarded one of the parties R50 for the damage done to his crops as well as for costs in the case *Held*, that the entire order was illegal and should be set aside, including the order as to costs PRAYAG MAHATON v GOBIND MAHATON (1905)
I L R 32 Calc 602
s c. 9 C W N 662

——— s. 145—*Possession given by Civil Court—Practice*—Where the petitioner had eight days before the institution of proceedings under s 145 of the Criminal Procedure Code been put in possession of a portion of the disputed plots of land by the Civil Court in execution of a decree establishing his right to the same *Held*, it was the duty of the Magistrate in the proceedings under s 145 of the Code of Criminal Procedure to find possession of the portion in accordance with the decree of the Civil Court The order so far as it directs the attachment of the disputed land covered by that decree is without jurisdiction. GULRAJ MARWARI v SHEIKH BHATOO (1905) I L R. 32 Calc 796

——— s 145 (1) and 439 (3)—*Revision—Jurisdiction to interfere with an order purporting to be passed under s 145*—Where an order purporting to be passed under s 145 (1) of the Code of Criminal Procedure after evidence recorded which satisfied the Magistrate that there existed a dispute likely to occasion a breach of the peace in respect of certain immoveable property, was found to be insufficient or defective in the sense that it gave no information as to the subject of the dispute and left the persons to whom it was issued quite in the dark as to the property in regard to which they had to set forth their respective claims, it was *held* that the inadequacy of such order gave the High Court jurisdiction to interfere *Mokesh Sowar* v *Narain Bag* I L R 27 Calc 981, and *Sukru Dosadh* v *Ram Pergash Singh*, I L R 30 Calc 443, followed IN RE T A MARTIN (1905)
I. L. R. 27 All. 296

——— ss. 148 (1), 148 (3)—*Attachment—Each party in possession of different portions of land—Costs—Magistrate's discretion—Revision by High Court—What costs should not be allowed*—When each party is found to be in possession of different portions of the disputed land, a Magistrate has no jurisdiction to order attachment under s 148 (1) of the Criminal Procedure Code A wide discretion as to costs is given to a Magistrate by s 148 (3) of the Code and the High Court has no power in revision to interfere with his exercise of that discretion Additional costs incurred for extra fees and travelling and other expenses of a like nature incurred by reason of bringing pleaders or counsel from a distance ought not to be allowed RAJENDRA NARAYAN ROY v MAHOMED ABDUMAND KHAN (1905)
9 C W. N. 687

——— ss 160, 202, 203—*Complaint—District Magistrate, dismissal by, when complainant examined by a Subordinate Magistrate—Police officer's power to require attendance of witnesses—Women, examination at their own houses—Police officer, charges against—District Superintendent of Police, enquiry by*—Where on a complaint being made, a Deputy Magistrate examined the complainant and the papers were then laid before the Deputy Commissioner and the Deputy Commissioner dismissed the complaint *Held*, that the order of dismissal was wrong Where the police had taken a number of women (stated to be related to certain absconders) from their village to the police station on the pretext that they wished to examine them, it was pointed out that the proper course was to hold the examination at their own houses The inadvisability of directing a District Superintendent of Police to enquire into the truth of charges laid against a *Sub-Inspector of Police* was also pointed out HALADHAR BHUMIJ v SUB INSPECTOR OF POLICE, HURA OUTPOST (1905) 9 C. W N 199.

——— s. 164.

——— ss. 164, 202, 222, 234, 364.

See CRIMINAL BREACH OF TRUST
I. L. R. 32 Calc 1065

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— ss. 192, 204, 528—*Transfer of case to Subordinate Magistrate—Refusal by trying Magistrate to issue process—Process, if can be issued by any other Magistrate—Joint Magistrate, power of—Discharge—Transfer of whole case.*—The police sent up a report in B form to the Joint Magistrate against certain persons, and subsequently on the order of the Joint Magistrate in an A form against some of them. These latter were convicted by a Deputy Magistrate, to whom the case was made over for disposal. An application for processes against the remaining persons mentioned in the original B form was refused by the trying Deputy Magistrate as unnecessary: *Held*, that a subsequent order by the Joint Magistrate for the issue of processes against these persons was without jurisdiction. The order making over the case to the Deputy Magistrate was in these terms: "To B—for disposal." *Held*, that the whole case had been made over. *In the matter of Golabdi Sheikh, 4 C. W. N. 827: s.c. I. L. R. 27 Calc. 979; Moul Singh* v. *Mahabir Singh, 4 C. W. N. 242; Radhabullav Roy* v. *Binode Behari Chatterjee, I. L. R. 30 Calc. 449*, referred to. HENDERSON, *J.*—The order of the Deputy Magistrate refusing to issue process as unnecessary amounted to a discharge. Where no reservation is made in the order transferring a case to another Magistrate, it should be concluded that the whole case had been made over. AJAB LAL KHERHER *v.* EMPEROR (1905) . . . . . 9 C. W. N. 810
s.c. I. L. R. 32 Calc. 783

——— s. 195.

See SANCTION FOR PROSECUTION.
I. L. R. 32 Calc. 18

——— s. 195.

See SANCTION FOR PROSECUTION.
I. L. R. 32 Calc. 351

——— s. 195, cl. (6)—*"High Court," meaning of—Execution of time—Appeal, right of—Jurisdiction.*—An appeal lies from an order, which purports to extend the period of an old sanction, but in effect is an order granting a new sanction to prosecute. "High Court" in s. 195 of the Criminal Procedure Code (Act V of 1898) does not mean a Judge sitting on the Original Side of the Court, but it means a Civil Appellate Bench of the Court; a Judge sitting on the Original Side has consequently no jurisdiction to entertain an application for extending the time during which a sanction under s. 195 of the Code is to remain in force. Such time cannot be extended after it has expired. *In re Muthukundam Pillai, I. L. R. 26 Mad. 190*, and *Karuppana Servagara* v. *Sinna Gounden, I. L. R. 26 Mad. 480*, dissented from. KALI KINKAR SETT *v.* DINOBANDHU NANDY (1905).
I. L. R. 32 Calc. 379
s.c. 9 C. W. N. 321

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— s. 195—*Whether a sanction granted to a particular person could be availed of by some other person.*—A sanction for prosecution expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority. *Giridhari Mondul* v. *Uchit Jha, I. L. R. 8 Calc. 435; Baperam Surma* v. *Gouri Nath Dutt, I. L. R. 20 Calc. 474; In re Banarsi Das, I. L. R. 18 All. 213; Kali Kinkar Sett* v. *Nritya Gopal Roy, 8 C. W. N. 883*, and *Darga Das Rukhit* v. *Queen-Empress, I. L. R. 27 Calc. 820*, referred to. JOGENDRA NATH MOOKERJEE *v.* SARAT CHANDRA BANERJEE (1905).
I. L. R. 32 Calc. 351
s.c. 9 C. W. N. 277

——— ss. 195, 200 (b)—*Initiation of proceedings—Prosecution by another without authority—Presidency Magistrate—Practice.*—Under a sanction to prosecute expressly restricted to a certain person, the prosecution may be initiated by another person expressly authorised by him to whom the sanction was granted; but such authority must be a matter of record so as to enable the accused to challenge its validity both before the Magistrate and also on appeal or revision. A Presidency Magistrate is not excused by s. 200, cl. (*b*) of the Criminal Procedure Code from recording the necessary evidence of such authority. KALI KINKAR SETT *v.* NRITYA GOPAL ROY (1905).
I. L. R. 32 Calc. 469
s.c. 9 C. W. N. 321

——— s. 195—*False charge—False information—Penal Code (Act XLV of 1860), ss. 182, 211.*—The accused, a railway station-master, sent the following telegram to a head-constable of the Railway Police—"A bag of paddy was stolen from my goods-shed last night. Thief was caught. Please come; prosecute him." The head-constable inquired into the matter and reported it to be false. The Inspector of Police, in submitting the case to the District Magistrate, recommended that the station-master should be called upon to show cause why he should not be prosecuted under s. 182 or s. 211 of the Penal Code. A judicial inquiry was held by a Deputy Magistrate, and the District Magistrate sanctioned the prosecution of the accused. The accused was tried and convicted under s. 182 of the Penal Code by an Assistant Magistrate with second class powers:—*Held*, that the sanction given by the District Magistrate was sufficient; that a prosecution for a false charge might be under s. 182 or s. 211 of the Penal Code, but if the false charge was a serious one, the proper course would be to proceed under s. 211. *Held*, further, that the present case not being a serious one, it was quite legal to prosecute the accused under s. 182 of the Code. *Bhokteram* v. *Heera Kalita, I. L. R. 5 Calc. 184; Russik Lal Mullick, in re, 7 C. L. R. 382*, followed. EMPEROR *v.* SARADA PROSAD CHATTERJEE (1905).
I. L. R. 32 Calc. 180

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861, ACT VIII OF 1869)—*continued.*

——— s. 198—*Hindu widow—Complaint by brother—"Person aggrieved"—Jurisdiction.*—Where the alleged offence was defamation imputing unchastity to a Hindu widow *Held*, that her brother, with whom she was residing at the time, was a "person aggrieved" by such imputation within the terms of s. 198 of the Criminal Procedure Code and it was competent to the Court to take cognizance of the offence upon his complaint. THAKUR DAS SAH v ADHAR CHANDRA MISSRI (1905)
I. L. R. 32 Calc. 425

——— ss. 203, 435, 439—*Complaint—Complaint, dismissal of—Revival of proceedings—Illegality*—When an original complaint is dismissed under s 203 of the Code of Criminal Procedure, no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority *Mir Ahwad Hussein v Mahomed Askari*, *I. L. R 29 Calc 720*, differed from ABDUL MENAN v PANDURANGA ROW (1905)
I. L. R. 28 Mad. 255

——— s 215—*Commitment to the Sessions if may be quashed by High Court—Evidence not sufficient to be left to a jury—Point of law—Records called for by Sessions Judge—Magistrate, if bound to stay proceedings—Abetment*—Where the evidence upon which a Magistrate ordered the commitment of the accused to the Sessions for trial upon charges of abetment of offences under ss 193, 196 and 471, Penal Code, was that (1) a servant in the employ of the accused gave false evidence and produced forged documents at the trial of certain rent suits in which the accused was the plaintiff, (2) that the accused was present actively prosecuting those suits, (3) that the evidence, if believed, would have supported his case, (4) that the accused sometimes made collections and had sometimes tested collection papers *Held* by HARINGTON, *J* (agreeing with HENDERSON, *J*)—That this just stopped short of a case which could properly be left to a jury *Commitment was accordingly quashed* HARINGTON, *J*—The test which should be applied, to decide whether a committal ought or ought not to be made on the facts is this—assuming that the whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made If there is any evidence which calls for an answer, however great the preponderance in favour of the prisoner may be, then the committal is proper SHROBUN RAM v EMPEROR (1905)
9 C. W. N. 529

——— s. 221, sub-s 2 and s. 225—*Rioting—Omission to set out the common object of an unlawful assembly—Prejudice to the accused.*—In all cases in which there is a charge under s. 147 of the Penal Code, the common object ought to be stated. But the omission to set out the common object does not necessarily make the conviction bad It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice. In a case under s. 147 of the Penal Code in which the facts were very simple and there were distinct findings by the lower Court as to the part which each of the accused took in the rioting *Held*, the accused were not prejudiced by the omission to set out in the charge the common object of the assembly. BENOY v LACHMINIA (1905) . . . . . 9 C. W. N. 599

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872, ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

——— s. 222.

See CRIMINAL BREACH OF TRUST

——— ss. 226, 227—*Addition to or alteration of—Indictment, subject-matter of—Cheating—Property—Money—Penal Code (Act XLV of 1860), s 420*—The Sessions Court is not a Court of original jurisdiction, and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to matter not covered by the indictment. The accused was put upon his trial before the Sessions Court on charges under ss 471 and 411 of the Penal Code Upon motion to the High Court it was held that a previous acquittal covered the charge under s 471, and that the accused could be tried only under s. 411. When the case came to trial the Sessions Judge amended the charge to one under s 411—*Held*, that the Judge had full power under the law to amend the charge, and that the High Court did not intend to fetter his discretion The word "property" in s 420 of the Penal Code includes money BIRENDRA LAL BHADURI v EMPEROR (1905)
I. L. R. 32 Calc. 22

——— ss. 233, 235—*Joinder of charges—One transaction—Prosecution's duty to prove—Receiving and retaining different articles of stolen property* Where the accused in one count were charged with having dishonestly received or retained eight sets of cooking utensils belonging to and stolen from eight different persons on eight different dates and thereby having committed an offence punishable under s. 411 of the Penal Code, and in another count were charged with having aided and abetted one another in the commission of the said offence under s 411 of the Penal Code, and thereby committed an offence under ss 109, 114 and 411 of the Penal Code and were convicted in a single trial: *Held*, that in the absence of evidence that the acts of receiving or retaining were so connected together as to form one transaction, the charges framed and the single trial held with respect thereto were illegal That the mere fact that there was no evidence of separate receipt or retention did not justify the joinder of charges It lay upon the prosecution to establish the facts, which would justify such a procedure *The dishonest* receipt or retention of each article constituted a separate offence and the accused could only be tried for three

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

of such offences committed within one year, unless it were shown that the receipt or retention of all the articles was so connected as to form one transaction. RAM SARUP BENIA v. EMPEROR (1905).
9 C. W. N. 1027

——— ss. 233, 239—*Joint trial of different accused—Receiving stolen property at different times and from different persons—Same transaction—Penal Code (Act XLV of 1860), s. 411.*—A theft was committed of certain property, including ornaments. *S* was one of the persons who received the stolen property from the thieves. *S* disposed of the property to several persons, and being indebted to *J* he gave a portion of the property to *J* in satisfaction of his debt. *K* was found to have in his possession a portion of the property identified as stolen in the same theft, but there was nothing to show when he received it and from whom. Under these circumstances the three persons *S*, *J* and *K* were tried together at one trial on charges of receiving stolen property knowing it to be stolen: *Held* by RUSSELL and BATTY, *JJ.*, that the three offences against the three accused *S*, *J* and *K* were distinct offences, which could not be regarded as offences committed in the same transaction within the meaning of s. 239 of the Criminal Procedure Code and that the trial of the three accused together was in contravention of the provisions of s. 233 of the Code and was therefore illegal. *Per* BATTY, *J.*—"The offence punishable under s. 414 of the Penal Code is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time, when both offences are committed." "The words of s. 239 of the Criminal Procedure Code of 1898, are, to say the least of it, ambiguous, if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction. The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts, which form the same transaction." "The inevitable result appears to be that the proceedings of the Magistrate were illegal and a nullity . . . There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither an appeal against acquittal nor an acquittal to reverse and the question whether the accused should now be legally tried is a question not for judicial decision, but for the consideration of the authorities, with whom it rests to proceed with a prosecution." *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61*, followed. EMPEROR v. JETHALAL (1905).
I. L. R. 29 Bom. 449

——— s. 234—*Penal Code, s. 409—Criminal breach of trust—Form of charge.*—In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. *Held*, that a charge so framed did not offend against s. 234 of the Code of Criminal Procedure. *King-Emperor* v. *Gulzari Lal, I. L. R. 24 All. 254*, followed. EMPEROR v. ISHTIAQ AHMAD (1905) . . . I. L. R. 27 All. 69

——— s. 259—*Complaint—Absence of complainant at hearing—Discharge of accused—Revival of proceedings on fresh complaint—Jurisdiction.*—Where an order of discharge under s. 259 of the Code of Criminal Procedure has been passed by a Magistrate, such order will not preclude him from proceeding with the case on a fresh complaint. An order of discharge under s. 259 of the Code of Criminal Procedure is not an acquittal nor has it the effect of an acquittal under s. 403. CHINNATHAMBI MUDALI v. SALLA GURUSAMY CHETTY (1905).
I. L. R. 28 Mad. 310

——— s. 303.

See THUMB MARK.
I. L. R. 32 Calc. 759

——— s. 364.

See CRIMINAL BREACH OF TRUST.

——— s. 421.

See PRACTICE . I. L. R. 32 Calc. 178

——— s. 421—*Appeal—Summary dismissal—Reasons, if to be recorded.*—It is not necessary where an appeal is summarily dismissed under s. 421 of the Code of Criminal Procedure, for the Magistrate to give any reasons for his decision. It must be taken, if he does dismiss an appeal summarily, that he considered there were no sufficient grounds for interfering. *Rash Behari Das* v. *Bal Gopal Singh, I. L. R. 21 Calc. 92*, followed. NITYA PAL v. BENIMADHAV GHOSE (1905) . . . . . 9 C. W. N. 623

——— s. 437.

See DISTRICT MAGISTRATE.
I. L. R. 32 Calc. 1080

——— s. 437—*Jurisdiction—Accused—Discharge—Omission to state reasons in the order for further inquiry.*—It is not, as a matter of law, obligatory on a District Magistrate to issue a notice upon the accused before directing a further inquiry under s. 437 of the Criminal Procedure Code, but according to the general principle of criminal jurisdiction, no order prejudicially affecting an accused should be passed without giving him an opportunity of being heard. It is not ordinarily desirable that a District Magistrate should make a detailed examination of the evidence and give elaborate reasons for ordering a further inquiry, but it is desirable that he should give enough reasons

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

to show that his order is a *proper one.* WAHED ALI v EMPEROR (1905) . I L R. 32 Calc 1090

——— s 439—*Revision—Practice—Order of acquittal*—Although the High Court has the power to interfere in revision with an original or appellate judgment of acquittal, it will *ordinarily not do so.* QAYYUM ALI v FAIYAZ ALI (1905) I. L. R. 27 All 359

——— s 439—*Revision—Practice—Discretion of Court*—Unexplained *delay* in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court, in the *exercise* of its discretion, declining to interfere EMPEROR v JAGAN NATH (1905) I. L. R. 27 All. 468

——— ss. 439 and 522—*Revision—Powers of High Court—Reversal of order under s 522*—*Held*, that under s 439 and s 423 (*1*) (*d*), the High Court has power, as a Court of revision, to reverse an order passed by a subordinate Court under s 522 of the Code of Criminal *Procedure Ram Chandra Mistry* v *Nobin Murdha*, *I L R* 25 *Calc* 630, distinguished. MANKI v BHAGWANTI (1905) I L. R. 27 All. 415

——— s 443 et seqq—*European British subject—Claim of status as a European British subject without claim to be tried by a jury—District Magistrate—Jurisdiction*—One *G P* who was sent for trial before a District Magistrate on charge of rioting under s 147 of the Penal Code, claimed that he was a European British subject, but did not ask to be tried by a jury The Magistrate after inquiry found that *G P* was not a European British subject, tried and convicted him under s 147, but passed upon him a sentence which as District Magistrate he could legally have passed upon a European British subject *G P* appealed to the Sessions Judge The Sessions Judge, on the question being again raised, found that *G P* was a European British subject, and thereupon set aside his conviction and sentence and directed that he should be retried by the District Magistrate *Held*, that this procedure was erroneous, inasmuch as the appellant had never claimed to be tried by a jury, and the Magistrate, who had tried and convicted him, was competent to try him as a European British subject and had passed a sentence, which was not in excess of his powers as a Magistrate trying a European British subject; the Sessions Judge on finding that the appellant was a European British subject should have gone on and heard his appeal on the merits *Empress of India* v *Berrill*, *I L R* 4 *All* 141, distinguished EMPEROR v GEORGE POWELL (1905) I. L. R. 27 All. 397

——— ss. 447, 449—*Aden Courts Act (II of 1864), ss 17, 20, 22, 23—Resident's Court at Aden—Sessions Court—Transfer of case to the High Court—Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden—Letters Patent, cl. 29*—It is not competent to the Resident at Aden to whose Court as a Court of Session a case is committed under s 447 of the Criminal Procedure Code, 1898, to transfer the case to the High Court, under the provisions of s 449 of the Code, on the ground that the offence cannot be adequately punished by him. The powers of the Court of Session conferred upon the Resident at Aden by the Aden Courts Act (II of 1864) are not merely such as are defined in the Criminal Procedure Code 1898; but such as are provided expressly in the Act itself And s 449 of the Code of Criminal Procedure, 1898, cannot affect those provisions The High Court of Bombay can, under cl. 29 of the Amended Letters Patent, transfer to itself a case pending in the Court of Session at Aden EMPEROR v ROBERT COMLEY (1905) I. L. R. 29 Bom. 575

——— s 476—*Perjury, committed before Munsif—Order for prosecution by his successor in office—Legality*—An order for prosecution passed by a Munsif, when the alleged offence of perjury was committed before his predecessor in office, does not fall within s 476 of the Criminal Procedure Code IN THE MATTER OF KRISHNA GOVINDA DUTT (1905) 9 C. W. N. 959

——— s. 476—*"Judicial proceeding"—Local enquiry, not authorised by law—Ss 100, 552—Custody of female child—Rival claim of husband and mother—Question for Civil Court—Proceeding before Deputy Magistrate—Order for prosecution for perjury by District Magistrate*—An application was made before the District Magistrate on behalf of a mother for the recovery of the custody of a female child from her grandfather *G*, who was thereupon called upon by a Deputy Magistrate to show cause *G* declared before the Deputy Magistrate that the child had been already married to *R* The Deputy Magistrate examined *R* and *G*, and having satisfied himself that the marriage had actually taken place submitted the case for orders before the District Magistrate, who dismissed the application. The District Magistrate upon a subsequent application, in which the story of the marriage was challenged as false held a local enquiry and came to the conclusion that *G* and *R* had given false evidence before the Deputy Magistrate and ordered their prosecution for perjury *Held*, that the alleged offence of perjury had not been brought to the notice of the District Magistrate in a "judicial proceeding" within the meaning of s 476 of the Code of Criminal Procedure, and the order for prosecution was made without jurisdiction The local enquiry held by him was one which in the circumstances of the case he was not authorised by law to make. Questions as to legal guardianship should be determined by the Civil Court *Ezahool Allan* v *King Emperor*, *I L R* 28 *Mad* 98, distinguished GODAI SHAHA v EMPEROR (1905) 9 C. W. N. 1030

——— s. 476—*Offence in the course of—Resistance to delivery of possession—Jurisdiction*

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1869)—*continued.*

—*Civil Procedure Code (Act XIV of 1882), s. 328.*—Where in an execution case a warrant for the delivery of possession of lands was entrusted for execution to the Nazir, who went to the spot, but was obstructed by the opposite party to the suit, and on his reporting the matter, the Munsif held an enquiry under s. 476 of the Criminal Procedure Code and sent the accused to the Magistrate for trial under s. 186 of the Penal Code: *Held*, that the "judicial proceeding" in the case determined when the Munsif finally decided the case, there being no further question left for determination as to the rights of the parties to the suit upon which evidence could have been legally taken, that the obstruction was not therefore brought to the notice of the Munsif in the course of a "judicial proceeding," and that he had no jurisdiction under s. 476 of the Criminal Procedure Code to hold an inquiry. HARA CHARAN MOOKERJEE *v.* EMPEROR (1905).
I. L. R. 32 Calc. 367
s.c. 9 C. W. N. 364

——— s. 488.

See MAINTENANCE, SUIT FOR.
I. L. R. 32 Calc. 479

——— s. 488—*Maintenance—Effect of Civil Court decree in a suit for restitution of conjugal rights upon an order for maintenance passed by a Magistrate.*—A husband, against whom an order had been passed by a Magistrate under s. 488 of the Code of Civil Procedure directing him to pay a monthly allowance of Rs-8 for the maintenance of his wife, brought a suit against his wife for restitution of conjugal rights. The suit was compromised, and a consent decree passed whereby the petitioner was to pay the respondent Rs-4 per mensem and to provide a house for her to live in near his own. *Held*, that this decree of the Civil Court superseded the order of the Magistrate passed under s. 488 of the Code of Civil Procedure. *In re Bulaki das, I. L. R. 23 Bom. 484*, followed. NUR MUHAMMAD *v.* AYESHA BIBI (1905) . I. L. R. 27 All. 483

——— ss. 488 and 489—*Maintenance of child—Power to cancel an order for maintenance.*—*Held*, that where an order has once been passed by a competent Court under s. 488 for the payment of maintenance for a child, the only power that exists of modifying such an order is that given by s. 499 of the Code. BUDHNI *v.* DABAL (1905).
I. L. R. 27 All. 11

——— s. 517—*False charge of theft—Objects found in complainant's premises—Conviction under s. 182, Penal Code (Act XLV of 1860)—Confiscation—Legality.*—Accused was convicted under s. 182 of the Penal Code for having given false information charging one *B* with the theft of some ornaments. The ornaments had been found upon search in the accused's own premises. Whilst convicting the accused the Magistrate passed an order confiscating the ornaments. *Held*, that such an order could not be made under s. 517 of the Criminal Procedure Code. The object of the section is to enable the Magistrate to direct property to be given to some person to whom it appears to belong or to allow it to continue in the possession of the person, in whose possession it was found or to make some order of that character. LAKSHMI NARAYAN DUTTA *v.* INSPECTOR UBEAGAN (1905) . . . 9 C. W. N. 597

——— ss. 517, 520—*Criminal misappropriation—Acquittal—Delivery of possession.*—Where on a charge of criminal misappropriation of an elephant the accused denied the ownership of the complainant, claimed the animal, and were acquitted. *Held*, that the elephant, although found to belong to the complainant, should be delivered to such one of the accused persons in whose possession it was found at the time the criminal proceedings were instituted: *Surendra Nath Surma v. Rai Mohan Dass, 7 C. W. N. 634*, doubted and distinguished. BALORAM GOGAI *v.* CHINTARAM KOLITA (1905).
9 C. W. N. 549

——— ss. 517, 520—*Order for the disposal of property regarding which an offence has been committed—Half currency notes.*—When a question arises between two persons, who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer. Hence, where *A* made over to *B* halves of certain currency notes as security for payment to *B* of the price of goods delivered, having previously parted with the other halves to *C*: *Held*, that *B* was entitled to recover possession of the halves originally made over to him, from *C*, to whom they had been delivered under an order of the Court, or to obtain compensation from *C*, if *C* had parted with them, inasmuch as it was *C*'s negligence, which enabled *A* to perpetrate a fraud upon *B*. *Foster v. Green, 7 H. and N. 881*, followed. ABDUR RAZZAQ *v.* RAHMAT-ULLAH (1905).
I. L. R. 27 All. 630

——— ss. 526, 528—*Transfer, grounds for—Bias—Cumulative effect of acts not justifying a transfer by themselves.*—Although each of the circumstances alleged may not by itself be sufficient to show that there was bias on the part of the Magistrate, a transfer would nevertheless be justified, where, having regard to all the circumstances taken together, the accused might not unreasonably apprehend that he would not have a fair trial. NITYANANDA KANARAR *v.* EMPEROR (1905) . 9 C. W. N. 619

——— s. 528.

See CRIMINAL PROCEDURE CODE, SS. 192, 204, 528 . . . 9 C. W. N. 811

——— s. 552.

See CRIMINAL PROCEDURE CODE, SS. 476, 552 . . . 9 C. W. N. 1030

——— s. 556—*Meaning of "personall interested"—Sub-Committee of Municipal Boar*

CRIMINAL PROCEDURE CODES, ACT V OF 1898 (ACT X OF 1882; ACT X OF 1872; ACT XXV OF 1861; ACT VIII OF 1859)—*concluded.*

advising a prosecution—*Held*, that a Magistrate, who had been a member of a Sub-Committee of a Municipal Board, which recommended the prosecution of a certain person for an alleged obstruction caused by him in a public thoroughfare, was not, by reason only of this fact, "personally interested" in the case afterwards initiated against such person so as to be debarred under s 556 of the Code of Criminal Procedure from trying it *The Queen* v *Handsley*, *L R 8 Q B D* 383, referred to EMPEROR v MOHAN LAL (1905) I L R 27 All 25

——— s. 556—*Meaning of "personally interested"—Magistrate making himself a witness in a case which he is trying*—On a day when the Courts were closed for the Christmas holidays two persons came to a Magistrate's private house, and there made an oral complaint to him When the Courts reopened the same persons filed a written complaint in the Magistrate's Court, which resulted in certain persons being put upon their trial before the same Magistrate for an offence under s 323 of the Penal Code During the course of the trial the Magistrate considered it his duty to record his own evidence as to the circumstances attending the making of the oral complaint at his house, and he was duly cross-examined and re-examined. *Held*, that the Magistrate could not be considered to be "personally interested" in the case within the meaning of s 556 of the Code of Criminal Procedure *In the matter of petition of Ganesh*, *I L R 15 All 192*, and *The Queen* v *Handsley*, *L R 8 Q B D 383*, followed *Hari Kishore Mitra* v *Abdul Bari Miah*, *I L R 21 Calc 920*, *Orish Chandra Ghosh* v *Queen Empress*, *I L R 20 Calc 857*; *Queen Empress* v *Manikam*, *I L R 19 Mad 263*, and *Serjeant* v *Dale*, *L R 2 Q B D 558*, referred to EMPEROR v NANHE (1905) I L R 27 All 33

CUSTOM.

See HINDU LAW

D

DAMAGES

See ACCOUNTS

See BENGAL TENANCY ACT, s 68 9 C W N 122

See CONTRACT ACT

See CONTRACT, BREACH OF 9 C W N 147

See CRIMINAL PROCEDURE CODE

See HUNDI . . 9 C W N 841

See JURISDICTION I L R 32 Calc 602

DAMAGES—*continued*

See LANDLORD AND TENANT 9 C W N 99

See NUISANCE . . 9 C W N 612
I L R 32 Calc 697

——— suit for.

See CONTRACT . I L R 32 Calc 96

See CRIMINAL PROCEDURE CODE, s 145. 9 C W N 862

See SUIT FOR COSTS I L R 32 Calc 429

——— *Agreement—Restraint of trade—Contract Act (IX of 1872), ss 23 and 27—Continuous cause of action—Transfer of business to a limited Company—Effect*—*Held*, that whether or not a High Court in India could award damages in respect of a continuing cause of action, up to the date of its decree, subsequent successive accruals of an obligation to contribute to a fund could not be treated as falling within that description, and could not be awarded in a suit where they had accrued due subsequently to its institution FRASER AND COMPANY v. THE BOMBAY ICE MANUFACTURING COMPANY (1905) I L R 29 Bom 107

——— *Suit for damages, maintainability of, in the Civil Court—Slander—Words spoken not defamatory to the person bringing the action*—A suit for damages for an alleged slander will not lie in the Civil Court at the instance of any person, when the words complained of are neither defamatory of him nor have they caused him any injury. *Per* HARRINGTON, *J*—A witness is not entitled to claim privilege for a slanderous statement wantonly made, which is neither an answer to any question addressed to him in examination or cross examination, nor has any connection at all with the case under trial. GIRWAR SINGH v SIRAMAN SINGH (1905) I L R 32 Calc 1069

——— *Damages, suit for—Breach of contract—License to work in forest—Construction of contract—Verbal agreement, contemporaneous—Evidence Act (I of 1872), ss 91 and 92, proviso (2)*—*One of two defendants in consideration* of advances made to him by the plaintiff for the purpose of paying the cost of obtaining the lease of a forest in the name of his son, the other defendant, made an agreement with the plaintiff that "when my son returns I will make him to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained." The son was not a party to the agreement *Held*, in a suit for damages for breach of contract in not giving the working of the forest to the plaintiffs, that on its true construction the agreement contemplated the making of a contract for working the forest only on the return of the son and left all terms to be then arranged, and the plaintiff was entitled only to recovery of the advances with interest An alleged contemporaneous verbal arrangement as to the rates the plaintiff was to pay for working the forest was *held* not to be proved; and

DAMAGES—*concluded.*

quære, whether, if proved, evidence of it would have been admissible with reference to s. 91 of the Evidence Act. MAUNG SHWE OH *v.* MAUNG TUN GYAW (1903) . . . I. L. R. 32 Calc. 96
s.c. 9 C. W. N. 147
L. R. 31 I. A. 188

DAYABHAGA.

See HINDU LAW.

DEBUTTER PROPERTY.

See CONTRACT ACT.

See LIMITATION ACT, s. 22.
9 C. W. N. 421

See PARTIES . I. L. R. 32 Calc. 582

DECLARATORY DECREE.

——— suit for.

See HINDU LAW.
I. L. R. 32 Calc. 62, 463

See JURISDICTION.
I. L. R. 32 Calc. 734

DECLARATORY SUIT.

See HINDU LAW . . 9 C. W. N. 25

DECREE.

See ADMINISTRATION.

See AGRA TENANCY ACT.

See COMPROMISE I. L. R. 32 Calc. 581

See LIMITATION I. L. R. 32 Calc. 175

See TRANSFER OF PROPERTY ACT, s. 86.
9 C. W. N. 577

———, for rent.

See DECREE . I. L. R. 32 Calc. 680

——— for sale.

See CIVIL PROCEDURE CODE.
I. L. R. 29 Bom. 13, 366
I. L. R. 27 All. 88 153, 325, 374, 380, 465, 575

See EXECUTION.
I. L. R. 29 Bom. 79, 615
I. L. R. 32 Calc. 265

——— *Amendment of decree—Limitation Act (XV of 1877), s. 5, and Sch. II, Art. 152—Appeal—Limitation—Sufficient cause for non-presentation of appeal within time.*—Where the original decree was signed on the 6th July 1903, and the plaintiffs applied, on the 22nd instant, to have the same amended in respect of the name of a party, which had been incorrectly recorded, and of the amount of the claim allowed, which had been entered as R606 instead of R1,600, and the amendment was made on the 22nd August. *Held*, that the period of limitation should be reckoned from the 22nd August as the date when the correct decree was prepared, and that an appeal filed on the 2nd September was within time. *Held further*, that under s. 5 of the Limitation Act there was sufficient cause for not presenting the appeal within thirty days from the date of the first decree. AMAR CHANDRA KUNDU *v.* ASAD ALI KHAN (1905) . . . . I. L. R. 32 Calc. 908

DEDICATION.

See ENDOWMENT.

See MORTGAGE.

DEFAMATION.

See PENAL CODE . 9 C. W. N. 911

——— *Voluntary statement by witness—Privilege of witness—Malice—False evidence—Penal Code (Act XLV of 1860), s. 500—Evidence Act (I of 1872), s. 132.*—A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another, commits an offence punishable under s. 500 of the Penal Code. *Moher Sheikh* v. *Queen Empress, I. L. R. 21 Calc. 392*, followed. *Woolfun Bibi* v. *Jesarat Sheikh, I. L. R. 27 Calc. 262*, discussed. HAIDAR ALI *v.* ABRU MIA (1905).
I. L. R. 32 Calc. 756
s.c. 9 C. W. N. 971

——— *Voluntary statement by witness—Privilege of witness—Malice—False evidence—Penal Code (Act XLV of 1860), s. 500—Evidence Act (I of 1872), s. 132—Penal Code (Act XLV of 1860), s. 499, Ex. (9), ill. (a)—Statement made to protect one's interests—Statement as to inference—Bonâ fides—Special damage—Civil action, proper remedy by.*—*K*, a creditor of *J*, of the firm of J. S. & Co., found his claims against *J* resisted, until he sued and got decrees against him. *K* came to know that *V*, a member of *J*'s firm, had presented his petition of insolvency. *K* also knew that *V* at the time of filing his petition had claims against *J*'s firm. *K* thereupon circulated amongst persons, who had dealings with the firm of J. S. & Co., a letter warning them not to make payments to the firm and containing the following statements: (1) That a member of the firm *V* had filed his petition under the Insolvency Acts, "the object being to collect the outstandings and defeat the creditors." (2) That the other members were not entitled to collect the outstandings and were not in a position to give an effectual discharge to persons making payments. (3) That *K* was taking steps to have all the other members declared insolvent. It is found that the firm of J. S. & Co. was without capital, and that subsequently to writing the letter *K* did file a petition of insolvency against the other members of the firm, though unsuccessfully. *Held*, on the above circumstances and taking the letter as a whole, that there was no defamation, the case falling under ill. (*a*), Exc. 9 to

DEFAMATION—*continued*

s. 499 of the Penal Code That the statement that the object of V's filing the petition of insolvency was to defeat creditors was merely a statement of the *reason*, which induced K to make the request he did to the recipients of the letters and the insertion of this inference alone was not sufficient to take the letter *out of the exception* It was *observed* that a libel of this kind being analogous to an act on on a case for special damage (caused, as alleged, by reason of injury inflicted on complainant's business by specific allegations made with respect to that business) can *more properly* be dealt with in the Civil than in the Criminal Court CASSEM KURRIM v JONAS HADJEE SERDICK (1905)
9 C W N 195

——— *Hindu widow—Complaint by brother—"Person aggrieved"—Jurisdiction—Criminal Procedure Code (Act V of 1898), s 198*—Where the alleged *offence* was defamation imputing unchastity to a Hindu widow: *Held* that her brother, with whom she was residing at the time, was a "person aggrieved" by such imputation within the terms of s. 198 of the Criminal Procedure Code, and it was competent to the Court to take *cognizance of* the offence upon his complaint. THAKUR DAS SAR v ADHAR CHANDRA MISRI (1905)
I. L. R. 32 Calc 425

DILUVION

See BENGAL TENANCY ACT s 179
9 C W N 886

DISCLAIMER.

See EVIDENCE

DISTRAINT.

See LIMITATION ACT, SCH II ART 36
9 C W N 376

DISTRESS.

See LIMITATION I. L. R. 32 Calc 458

DISTRICT JUDGE

See BENGAL DRAINAGE ACT
See TRANSFER I. L. R. 32 Calc 875

DISTRICT MAGISTRATE.

See CRIMINAL PROCEDURE CODE, s 437
I. L. R. 32 Calc. 1090
See MAGISTRATE, JURISDICTION OF
I. L. R. 32 Calc 1090

DIVISION COURT.

See APPEAL.

DIVORCE

See MAHOMEDAN MARRIAGE

DOBAS

See FISHERY

DOCUMENT

See EVIDENCE.

See SPECIFIC PERFORMANCE.

——— *Construction of document—Bombay Revenue Jurisdiction Act (X of 1876, as amended by Act XVI of 1877), s 4—"Any other written grant"—Land free from assessment—Treaty—Civil Courts—Jurisdiction—Specific Relief Act (I of 1877) s 42—Suit for declaration—Consequential relief—Amendment of plaint—Held*, that, generally speaking, the name given by the parties to a document is *not* conclusive as to its nature; but the designation given by the parties themselves to it cannot be lost sight *of*, where the document is ambiguous and is susceptible of more than one construction as to its nature and scope BALABHAI v THE SECRETARY OF STATE FOR INDIA (1905) . . I. L. R. 29 Bom 19

——— *Construction of wills—Repugnancy in words—Held* that the rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE GENERAL OF BOMBAY v HORMUSJI (1905) . . I. L. R. 29 Bom 375

——— *Construction of document—Mortgage—Interest—Possession—Liability of mortgagee in possession to account for rents and profits*—The defendants were in possession of two shops under a mortgage *from* the plaintiffs The plaintiffs sought to recover possession alleging that the mortgage debt had been satisfied by the rents and profits of the shops The defendants pleaded, *inter alia*, that they were not liable under the terms of the mortgage to render an account of the *rent realized*. The material portion of the mortgage was in the following terms —"We have borrowed nine hundred and fifty-one (951) *rupees in cash of the Nana Shahi* coin on account thereof" and paid the same to Punno and Chunnu of Saugor Interest shall be paid on this money at R1 per cent Rupees 9 3-6 shall be paid for every month as the sum remaining after deduction, the promised time being five years Should we pay the money within five years, we shall get the shops We shall pay the expenses relating to the two shops Should they be paid by the mortgagees, *we* shall pay them the same together with interest without any objection *Held*, on a construction of the mortgage by STANLEY, *C J*, and BLAIR, *J* AIKMAN *J*, *dissentiente*, that, there being no contract to the contrary, the mortgagees, if they got possession, which they did, were bound to account for the *rents* and profits received by them, whilst in such possession There was no agreement that the mortgagees should take the *rents* and profits without

DOCUMENT—*continued.*

accounting in addition to the stipulated interest. MADARI v. BALDEO PRASAD (1905).
I. L. R. 27 All. 351

——— *Construction of document.—Deed of trust executed by King of Oudh providing pensions to members of family and support to religious endowment out of interest on Government Loan subscription—"Heirs"—"Descendants"—Suit for pension on death of pensioner—Succession to pension.*—By a deed of trust dated 23rd November 1834, the King of Oudh appropriated the interest of a sum of 12 lakhs of rupees lent to the East India Company to the payment in perpetuity of pensions to certain persons named in the deed and to making provision for the support of a religious endowment. By Art. 1 (which stated that "the interest has been bestowed as a gift on the person named herein") trustees were named and appointed, and after them "their descendants," to manage the endowment, and a person was named, and his "descendants" after him, as the vakil of the pensioners through whom the pensions were to be paid. Art. 2 commended the pensioners and their "descendants" to the kindness and support of the Government. Art. 3 provided for the gift over of the pensions in the case of any of the pensioners, or after them any of their "heirs," dying without "heir." Art. 4 referred to the trustees of the endowment and their "descendants" and in case no "descendant" remained, provided for the appointment of one of the pensioners "in place of the person dying without heir." *Held*, by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioners of Oudh) that on the true construction of the deed the succession to a pension on the death of one of the pensioners was not limited to an heir, who was also a descendant, but the heir by Mahomedan law of the deceased pensioner (in this case the sister) was entitled to succeed. *Nawab Sultan Mariam Begam* v. *Nawab Sahib Mirza, L. R. 16 I. A. 175: I. L. R. 17 Calc. 234*, distinguished. This construction did not introduce any inconsistency between Art. 2 and Arts. 1 and 3 of the deed, because the class of persons mentioned in Art. 2 could not be assumed to be precisely co-extensive with the class who could, under the latter articles, enjoy the pensions. Even if the words "heir" and "descendant" were used as convertible terms in portions of the deed relating to the devolution of the rights of the managers of the endowment and of the vakil of the pensioners, that would not affect the right of succession to the pensions, the descent of the trusteeships and the descent of the beneficial interest in the pensions being distinct things, and there being nothing to show they were intended to be governed by the same rules. NUR JAHAN BEGAM v. FAGHFUR MIRZA (1905).
I. L. R. 27 All. 383

——— *Construction of document—Grant of zamindari by Government to member of a joint Hindu family and another—Joint tenants—Tenants-in-common.*—In 1886 Government granted, as a reward for services rendered during the Mutiny, certain zamindari property to Jiwan Ram, Chatterpat, and Nem Ram, members of a

DOCUMENT—*concluded.*

joint Hindu family, and to one Puse, a stranger to the family. Puse shortly afterwards got his share separated. Nem Ram died leaving a widow, Musammat Phulla, and after his death Jiwan Ram, Chattarpat, and Phulla joined in selling a portion of the property, the subject of the grant of 1886, to one Nur Ahmad. *Held*, on a suit by certain members of the joint Hindu family, who were not parties to the sale, to recover from the representatives of the vendees the share in the property sold, which had been of Nem Ram in his life-time, that the grant of 1866 conveyed the property to the grantees as joint tenants, and not as tenants-in-common, and therefore the transfer impugned was valid. GOBIND PRASAD v. INAYAT KHAN (1905) . . I. L. R. 27 All. 310

——— *Lease—Admissibility of evidence—Dismissal of suit on account of inadmissibility of document relied on by plaintiff.*—The plaintiff sued to eject the defendants from a certain shop, basing his case upon a document put forward as a "kirayanamah" or lease. This document was ruled inadmissible for want of registration and plaintiff's suit thereupon dismissed. *Held*, that even if the document were inadmissible in evidence, its rejection did not involve the dismissal of the plaintiff's suit. The document in question was in the following terms:—"I take the shop on a rent of R50 per annum without any limit of time for ever . . . I shall pay the rent month by month rateably to Mahant Puran Das . . . On non-payment of rent a right to eject the tenants shall at once accrue to the owner of the shop." *Held*, that this was not a lease, nor even a counterpart of a lease, but a mere statement of the intention of the writer, which might be given in evidence for what it was worth. BENI v. PURAN DAS (1905) . . I. L. R. 27 All. 190

DOMICILE.

See PRIVATE INTERNATIONAL LAW.

——— *Domicile of origin—Abandonment—Acquiring fresh domicile—Onus of proof—Immoveable property, rights over.*—The person, who attacks a settlement on the ground of nationality, must show conclusively that the nationality of the settlor was foreign, and, if he succeeds in doing so, the onus is then shifted upon the person supporting the settlement to show that the settlor had acquired a fresh domicile in British India, and that his estate ought to be administered according to Indian law. All rights over immoveable property are governed by the law of the country, where the property is situate, this principle being universally recognised. *De Nicols* v. *Curlier, A. C. 21; In re De Nicols, 2 Ch. 410*, dissented from. A. L. BONNAUD v. EMILE CHARRIOL AND OTHERS (1905).
I. L. R. 32 Calc. 631

E

EASEMENT.

See LANDLORD AND TENANT.
9 C. W. N. 856

EASEMENT—*concluded*

——— *Easement—Light and air—Obstruction—Injunction—Test of actionable obstruction—Nuisance*—To constitute an actionable obstruction of ancient lights and unrestricted flow of air, it is not enough that the light is less than before and the plaintiff enjoys less flow of air. The test is whether the obstruction complained of is a nuisance. An injunction was granted, where it was found that a wall built by the defendant on his own land would, having regard to its proximity to plaintiffs' godown, cause such substantial privation of light and impede the flow of air to such an extent as would prevent the plaintiffs from carrying on therein their jute-business as beneficially as before *Colls v. Home and Colonial Stores A C 179*, followed. ANDERSON v. HARDUT ROY CHAMARIA (1905) . 9 C W N 543

EASEMENTS ACT (V OF 1882).

——— s. 7, illustration (*j*)—*Stream—Usufruct—Riparian owner—Right to use and consume water without material injury to other like owners*—With respect to riparian owners the law is that each such owner has a right to the usufruct of the stream, which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. *Embrey v. Owen*, 6 *Exch 353*, followed. S 7, illustration (*j*), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners. DINKAR v. NARAYAN (1905) . I. L. R. 28 Bom. 357

——— s. 13, cls. (e) (f)—*Easement of necessity—No easement on the ground of convenience, when there is other means of access—Evidence Act (I of 1872), s 92—Oral contemporaneous agreement cannot be set up to add to a written contract*—*Held*, that if *A* has a means of access to his property without going over *B*'s land, *A* cannot claim a right of way over *B*'s land on the ground that it is the most convenient means of access. The law under s 13, cl. (*e*) of the Easements Act is the same as the law in England. *Watzler v. Sharpe, I L R 13 All 270 at p 281*, followed. *Ezekiel v. Damodar Ishvardas I L R 16 Bom 552 at p 559*, not followed. *The Municipality of the City of Poona v. Vaman Rajaram Gholap, I L R 19 Bom 787*, not followed. To sustain a claim under s 13, cl. (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement. KRISHNA MARAZU v. MARRAZU (1905)

I. L. R. 28 Mad. 495

EJECTMENT, SUIT FOR.

See LANDLORD AND TENANT 9 C W. N. 141, 379, 460
I. L. R. 32 Calc. 41, 51

See LEASE . I. L. R. 32 Calc. 648

ENCROACHMENT.

See JURISDICTION OF MAGISTRATE
I. L. R. 32 Calc. 287

ENDOWMENT.

See HINDU LAW . 9 C W. N. 528
I. L. R. 27 All. 581

See LIMITATION I. L. R. 32 Calc. 129

See MAHOMEDAN LAW 9 C. W. N. 625

See MORTGAGE . . 9 C. W. N. 814

——— *Words of dedication*.—Where in a deed of gift and dedication the following passage occurred: "The right and power of gift are yours. I and my heirs shall have no liability, claim or right:" *Held*, that there was no absolute dedication of the property to the idol so as to constitute the property covered by the same *debuttar* and inalienable. HARASUNDARI MAITYNDAR v. BAGANYA KUMAR ROY (1905) . . . 9 C. W. N. 154

——— *Valid religious endowment, conditions of—Absolute gift, restraint upon immediate enjoyment—Residuary clause, construction of—"Moveable properties for the service of idols," construction of*—In order to constitute a valid endowment all that is necessary is to set apart specific property for specific purposes and when these purposes are clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule, which forbids the creation of a perpetuity. The trust does not become invalid by reason of the fact that there is no express gift to any specific idol or that the gift of certain of the properties is to idols which are not existent, provided the testator clearly expresses an intention to bequeath certain of his properties to specific religious or charitable trusts, *e.g.*, performance of Durga and Lakshmi Pujahs, which his executors and trustees are to carry out in the manner indicated by his Will. The Court will only frame a scheme, when a testator having expressed a clear intention to create a trust has failed to indicate the means by which the trust is to be carried out. By his Will the testator directed that the intermediate interest for 13 years in certain properties was not to go to his sons, but was to be dealt with by the trustees in carrying out certain specific trusts after which period the properties were to go to the sons absolutely: *Held*, that the above restraint on the enjoyment of the properties was not bad in law. *Lloyd v. Webb, I. L. R. 24 Calc 47*, distinguished. The last clause in the Will was "I also direct that all the moveable properties and articles, which I shall leave, my executors and trustees shall keep apart such of them as they shall think

ENDOWMENT—*concluded.*

necessary for the service of the *thacoors* and they shall after 13 years divide the remainder among my three sons in equal shares": *Held*, that this clause applied only to those articles, which were suitable for the worship of the *thacoors* and that it did not refer to moneys and other articles in the hands of the executors. The Court also gave a direction that, after due administration, the executors should deal with the balance in their hands as in the case of intestacy and divide the same among the sons of the testator as his heirs. PRAFULLA CHUNDER MULLICK *v.* JOGENDRA NATH SREEMANY (1905) . . 9 C. W. N. 528

ENHANCEMENT OF RENT.

See BENGAL TENANCY ACT, s. 7.
9 C. W. N. 534

——— s. 29.

See BENGAL TENANCY ACT 9 C. W. N. 265
See FORFEITURE . 9 C. W. N. 355
See LANDLORD AND TENANT.
9 C. W. N. 928
See WILL . . . 9 C. W. N. 309

——— *Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable—Land Revenue Code (Bombay Act V of 1879), s. 83—Inamdar—Grantee of Royal share of revenue or of soil.—Held*, that in a suit by an Inamdar to enhance rent of Mirâs land, it must be determined whether what was paid was rent and whether the Inamdar has a right to enhance as against one, who holds on the same terms as the defendant does; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR (1905) . I. L. R. 29 Bom. 415

——— *Landlord and tenant—Enhancement of rent, suit for—Bastu land within Municipality—Bengal Tenancy Act (VIII of 1885) not applicable—Maintainability of suit—Notice.*—Where the subject-matter of a tenancy is *bastu* land situated in a Municipality (to which the provisions of the Bengal Tenancy Act are not applicable), a suit for enhancement of rent brought by a landlord without previously serving the tenant with notice either to quit or to pay rent at the enhanced rate, must fail. *Ranee Lalunmonee* v. *Raja Ajodhya Ram, 23 W. R. 61*; and *Trilochun Dass* v. *Gagan Chunder Dey, 24 W. R. 413*, referred to. KRISHNA KANT SAHA *v.* KRISHNA CHANDRA ROY (1905) . . . . . 9 C. W. N. 303

EQUITY.

See ADMINISTRATION.

EQUITY OF REDEMPTION.

See MORTGAGE . . 9 C. W. N. 20
See SALE . . . 9 C. W. N. 225

EQUITABLE ESTATES.

——— *Lease—Assignment of lease—Mortgage of lease—Liability of the mortgagee to the landlord—Possession of the mortgagee.—Held*, that in India there is no distinction between legal and equitable estates, although in ordinary parlance the distinction is often referred to. Hence, when a lessee mortgages his interest in the land, the mortgagee becomes liable for the rent to the lessor only, if he (the mortgagee) enters into possession of the land or does any act equivalent to entry into possession. VITHAL NARAYAN *v.* SHRIRAM SAVANT (1905) . . . . I. L. R. 29 Bom. 391

ESTOPPEL.

See CIVIL PROCEDURE CODE, s. 287.
I. L. R. 27 All. 684

See LANDLORD AND TENANT.
I. L. R. 29 Bom. 580
See NORTH-WESTERN PROVINCES RENT ACT, s. 93 . I. L. R. 27 All. 569
See PARTIES . I. L. R. 27 All. 23
See PRACTICE . I. L. R. 29 Bom. 133
See PRE-EMPTION I. L. R. 27 All. 544

——— *Estoppel by judgment—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Purchaser, previous suit—Defence in previous suit—Vendor, possession of—Pleader, non-disclosure of facts by—Evidence Act (I of 1872), s. 115—Fraud—Silence, when fraudulent.*—A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit. *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company, 1 Ch. 578*; *Mohunt Das* v. *Nilkomal Dewan, 4 C. W. N. 283*, followed. If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiff, who, having been so misled, had sued them, the decree in suit would bind him on the ground of fraud. Silence amounts to fraud for which a Court will grant relief only, when it is the non-disclosure of those facts and circumstances, which one party is *legally* bound to communicate to the other. *Fox* v. *Mackreth, 2 R. R. 55*, followed. *M'Kenzie* v. *British Linen Company, 6 App. Cas. 82*, distinguished. The silence must also be a true cause of the change of position of the other party. *Pickard* v. *Sears, 6 A. and E. 469: 45 R. R. 538*, referred to. A person conducting as pleader the defence on behalf of a defendant is under no legal obligation to disclose to the plaintiff the fact that the defendant had, prior to the suit, transferred the subject-matter of the suit to him. *Mohunt Das* v. *Nilkomal Dewan, 4 C. W. N. 283*, referred to. S. 115 of the Evidence Act (I of 1872) does not apply to a case, in which a belief, otherwise caused, has been only allowed to continue by reason of any omission on the part of the person against whom the

ESTOPPEL—*concluded*

estoppel is sought to be raised JOY CHANDRA BANERJEE v SREENATH CHATTERJEE (1905) I. L. R. 32 Calc 357

EUROPEAN BRITISH SUBJECT.

See CRIMINAL PROCEDURE CODE ss 44 *et seq* . I L R. 27 All 397

———*European British subject—Claim of status as a European British subject without claim to be tried by a jury—District Magistrate—Jurisdiction*—One *G D*, who was sent for trial before a District Magistrate on a charge of rioting under s 147 of the Indian Penal Code, claimed that he was a European British subject, but did not ask to be tried by a jury The Magistrate after inquiry found that *G P* was not a European British subject, tried and convicted him under s 147, but passed upon him a sentence, which as District Magistrate he could legally have passed upon a European British subject. *G P* appealed to the Sessions Judge The Sessions Judge, on the question being again raised, found that *G P* was a European British subject, and thereupon set aside his conviction and sentence and directed that he should be retried by the District Magistrate. *Held*, that the procedure was erroneous, inasmuch as the appellant had never claimed to be tried by a jury, and the Magistrate, who had tried and convicted him, was competent to try him as a European British subject and had passed a sentence, which was not in excess of his powers as a Magistrate trying a European British subject The Sessions Judge on finding that the appellant was a European British subject should have gone on and heard his appeal on the merits. *Empress of India v Berrill*, I L R 4 All 141, distinguished EMPEROR v GEORGE POWELL (1905) . I. L. R 27 All 397

EVIDENCE.

See CHOWKIDARI CHAKRAN LAND I L. R 32 Calc 1107

See CIVIL PROCEDURE CODE s 183 9 C W N 418, 420

See CIVIL PROCEDURE CODE ss 389, 390 9 C W N. 794

See CRIMINAL BREACH OF TRUST I. L. R. 32 Calc. 1065

See CRIMINAL PROCEDURE CODE s 215 9 C. W N 829

See MAHOMEDAN LAW 9 C. W N 352

See PENAL CODE, s 232. 9 C W N 438

See SALE I. L. R 32 Calc 509, 544

———*Documents—Res inter alios acta*,—Documents which would be admissible against persons through whom one claims cannot be objected to by him on the ground that they are *res inter alios acta* RANI SRIMATI v KHIROYORA NARAIN SINGH (1905) . . . . 9 C. W. N 74 L. R. 31 I. A. 127 I. L. R. 31 Calc 871

EVIDENCE—*concluded*

———*Pedigree, proof of—Evidence of witnesses who have heard names of ancestors recite—Evidence of relatives—Grounds for discrediting evidence—Mode of dealing with evidence—Witnesses, credibility of*—Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives The relationship of a class of witnesses should be considered only with the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted, and should not be treated as making them interested or unreliable witnesses The fact that one of such persons besides being a relative was assisting the plaintiff in the case, and that the other witnesses were connected with this person by blood or service, is not necessarily sufficient ground for discrediting their evidence The rejection of certain specific statements of a witness is not necessarily a ground for disbelieving the whole of his evidence; nor is the fact that a Judge has not acted on certain portions of his evidence, which may be due to caution on the part of the Judge or inaccuracy on the part of the witness. DEBI PERSHAD CHOWDHRY v. RADHA CHOWDHRAIN (1905) . . I. L. R. 32 Calc 84 s c. 9 C W N 164 L. R. 31 I. A. 180

———*Executor, proof of title of—Probate—Administration, grant of—Jurisdiction of Court to modify—Succession Act (X of 1865), ss 3, 179, 187, 260—Sale for arrears of rent—Incumbrances, annulment of—Notice—Disclaimer—Bengal Tenancy Act (VIII of 1885), s 167.*—Under ss. 179, 187 and 260 of the Indian Succession Act, where *probate of a will has been granted, the executor*, in order to bring a suit as such, is bound to prove his title, to do which in case of dispute he must file, not merely a copy of the grant of administration, but also the copy of the will attached to it, the two together forming the probate as defined by s. 3 But a Court, not being the Court of Probate, cannot go behind the grant and interpret and modify its terms by the provisions of the will. In a *suit for* possession after annulment of an under-tenure under s 167 of the Bengal Tenancy Act, absence of due service of notice on a person, who in the suit disclaimed all interest therein, cannot prejudice the plaintiff. But, if the application for the *issue of the notice* against some of the persons jointly interested in the incumbrance was not made within time, the whole suit must fail. DELANEY v ROHAMAT ALI (1905) I. L. R 32 Calc 710

EVIDENCE ACT (I OF 1872).

———s. 2—*Oral contemporaneous agreement cannot be set up to add to a written contract*—

EVIDENCE ACT (I OF 1872)—*continued.*

Easements Act (V of 1882), s. 13, cls. (e), (f)—Easement of necessity—No easement on the ground of convenience, when there is other means of access.—*Held*, that if *A* has a means of access to his property without going over *B's* land, *A* cannot claim a right of way over *B's* land on the ground that it is the most convenient means of access. The law under s. 13, cl. (*e*) of the Easements Act, is the same as the law in England. *Wutzler* v. *Sharpe, I. L. R. 15 All., 270 at p. 281*, followed. *Esuvai* v. *Damodar Ishvardas, I. L. R. 16 Bom. 552 at p. 559*, not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap, I. L. R. 19 Bom. 797*, not followed. To sustain a claim under s. 13, cl. (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement. KRISHNAMARAZU *v.* MARRAJU (1905).
I. L. R. 28 Mad. 495

——— ss. 13 (b), 32 (3) & (5), 6, 49, 90.
See HINDU LAW . I. L. R. 32 Calc. 6

——— s. 15.
See MORTGAGE.

——— s. 21.
See BENAMI.

——— ss. 24, 26.
See CIRCUMSTANTIAL EVIDENCE.
9 C. W. N. 474

——— s. 32—*Witnesses—Relationships.*—On a question of relationship, the statements of certain witnesses, who were supposed to be speaking from information derived from others, were sought to be made admissible under s. 32 of the Evidence Act. They did not however state the persons from whom they derived that information nor at what period of time they derived it. *Held*, that the Courts in India had properly applied the provisions of s. 32 of the Evidence Act, in rejecting this evidence. SHAFIQUNNESSA *v.* KHAN BAHADUR RAJA SHABAN ALI KHAN (1905).
9 C. W. N. 105

——— s. 34—*Amlahs—Furds—Accounts*—A person used to enter all his receipts and all the advances he made to his *amlahs* first in a *khata* book. The *amlahs* used to submit *furds* embodying the expenses incurred by them and these used to be regularly checked by him. He used to prepare his monthly and other accounts from the *khata* book and the *furds*. *Held*, that these accounts having been kept regularly in the course of business, were admissible under s. 34 of the Evidence Act, even though the *khata* book itself was not produced. *The Deputy Commissioner of Barabanki* v. *Ram, 4 C. W. N. 147: s.c. I. L. R. 27 Calc. 118*, referred to. PEARY MOHON MOOKERJEA *v.* NARENDRA NATH MOOKERJEA (1905) . 9 C. W. N. 421
s.c. I. L. R. 32 Calc. 582

EVIDENCE ACT (I OF 1872)—*continued.*

——— s. 43—*Judgments inter alios—Admissibility—Approbating and reprobating by same person, rule against—Application—Right of lessor against partner of lessee.*—A lessor sued to recover his rents from his lessee as well as from a third party on the allegation that his lessee and such third party were partners and that the lease had been acquired for the purposes of the partnership business, in proof whereof he relied on a decree passed on an arbitration award made in a suit for dissolution of partnership between the lessee and the third party, declaring that the lease was acquired for partnership purposes and that the partners were equally liable for the debts and equally entitled to the outstanding dues of the partnership business. It was further proved that in a suit by the lessee to recover some of the outstanding dues, the third party, relying on the award, had claimed and recovered a share of the money sued for. *Per* GHOSE, *J.*—The judgment passed upon the award was relevant in this case upon the question whether the lease was acquired by the lessee for his own benefit or as partnership property and the plaintiff was entitled to recover rent from both the partners. *Bhitto Kunwar* v. *Kesho Pershad Misser, 1 C. W. N. 265 : s.c. I. L. R. 19 All. 277; Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171; Surender Nath Pal Chowdhuri* v. *Brojo Nath Pal Chowdhuri, I. L. R. 13 Calc. 352; Tepu Khan* v. *Rajoni Mohun Das, 2 C. W. N. 501 : s.c. I. L. R. 25 Calc. 522; Ram Ranjan Chakerbati* v. *Ram Narain Singh, I. L. R. 22 Calc. 533*, referred to. *Per* GEIDT, *J.*—Neither the award nor the conduct of the third party in the subsequent suit was admissible as evidence in this case to prove that the third party was liable to the plaintiff for rent. *Whately* v. *Menheim, 2 Esp. 608 (Mich. T. 38 Geo. III)*, and *Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171*, referred to. *Tepu Khan* v. *Rajoni Mohun Das, 2 C. W. N. 501 : s.c. I. L. R. 25 Calc. 522*, and *Ram Ranjan Chakerbati* v. *Ram Narain Singh, I. L. R. 22 Calc. 533*, considered. *Per* GEIDT, *J.*—The mere existence of a judgment, its date and legal consequences are conclusively proved as against all the world by the production of the record, but it furnishes no proof whatever of collateral facts, even though as between the parties to such judgment themselves such facts must have been proved. *Per* GEIDT, *J.*—Judgments *in personam* are conclusive *against* third persons (but not in their favour) of the relationship between the parties and of the extent of the relation. In the circumstances of the case the Court made a decree against both the lessee and the third party, the liability of the latter being restricted solely to his interest in the leasehold. ABINASH CHANDRA CHATTERJEE *v.* PARESH NATH GHOSE (1905).
9 C. W. N. 402

——— s. 45.
See THUMB-IMPRESSIONS.
9 C. W. N. 520

——— ss. 85, 114—*Power-of-Attorney executed before and authenticated by a notary*—

EVIDENCE ACT (I OF 1872)—*continued*

Evidence of identification of executant, if necessary —Rules and Orders of the Calcutta High Court, Rule 743—S 85 of the Evidence Act is mandatory When a document purporting to be a Power of Attorney and to have been executed before and authenticated by a Notary Public is produced before the Court an affidavit of identification as to the person purporting to make the *Power-of Attorney* being the person named therein is unnecessary If the Court, however, is not satisfied as to its execution and authentication, it may under *Rule 743 of the* Court's Rules and Orders, call for further evidence. IN THE GOODS OF W H MYLNE (1905) 9 C W N 983

——— s. 90—Evidence—*Admissibility—Hearsay evidence—Relationship, statement as to, made upon information received from others, when admissible—Document more than 30 years old—Discretion of Court to refuse to admit without formal proof—Interference by higher Court*—The Courts in India refused to admit without formal proof a document, which was more than 30 years old and which purported to come from proper custody: *Held*, on a review of circumstances that the lower Courts had properly exercised the discretion vested in them under s 90 of the Evidence Act. The Judicial Committee would always be extremely slow to overrule the discretion exercised by a Judge under *s 90 of the* Evidence Act. SHAHIB UN NISSA v KHAN BAHADUR RAJA SHAHAB ALI KHAN (1905) . 9 C. W N. 105

——— s 91—*Contemporaneous oral agreement—Contract—Quære*—Whether evidence of a contemporaneous oral agreement relating to the terms of the proposed contract would be admissible under s. 91 of the Evidence Act MAHOMED SAWR GA v MAHOMED TYB GROW (1905) 9 C. W N 147
s.c I. L. R. 32 Calc. 96
L. R. 31 I A. 166

———s. 92, proviso (2)

See CONTRACT.

I. L. R. 32 Calc. 96

———s. 92, *proviso (1).*

See EVIDENCE.

I. L. R 32 Calc. 467

——— s. 92, proviso (1)—*Oral evidence—Wagering contract—Written agreement—Agreement, validity of—Contract, real nature of*—Upon the true construction of *s 92 of* the Evidence Act (I of 1872), and specially having regard to proviso (*f*) of that section, the decision in the case of *Juggernauth Sew Sux v Ram Dyal*, I L R 3 *Calc 791*, cannot be regarded as law In order to enable a Court to arrive at a decision, whether or not an agreement is void, on the ground that it is by way of wager the party who sets up that it is should be allowed to go into evidence to prove that it is so *Kong Yee Lone & Co v Lowjee Bunjee*, *I L R 23 Calc 461*; *L R 28 I A 239*, referred to *Per* WOODROFFE, *J*—If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under the rule embodied in s 92 of the Evidence Act, which exists against the contradiction and variance of the terms only of those instruments, the validity of which is not in question. The instances mentioned in proviso (*f*) of that section are illustrative and not exhaustive BENI MADHAB DASS v SADASOOK KOTARY (1905)
I. L. R. 32 Calc 457
s c. 9 C. W. N 305

——— s 110
See EVIDENCE . . 9 C. W. N. 88

——— s 114
See s. 85 . . 9 C W. N. 986

——— s. 114 (e)
See CHOTA NAGPUR CHAKRAN LAND, SETTLEMENT OF . I. L. R. 32 Calc 1107

——— s. 115
See ESTOPPEL BY JUDGMENT
I. L. R. 32 Calc 357

——— s. 115
See FORFEITURE . 9 C W. N. 553

——— s. 115—*Grant—Re-grant after confiscation—Exception of Mahals in re-grant—Construction of exception—Title by adverse possession—Estoppel—Mahals treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government*—Prior to 1799 the zamindari of Parlakimedi included certain tracts of forest land called "Mahals," which were held by Bissoyees or local Chiefs on service tenures in respect of which they paid to the zamindar a sum as hatta badi or quit rent; their duties being (*inter alia*) to keep up an establishment of guards at certain thanas for police purposes Besides the Mahals they held other lands, which they occupied and cultivated for their own support. In consequence of a rebellion in 1799, in which the then zamindar took part, the Government by a proclamation issued in 1800 declared that the zamindari was confiscated; and that the Bissoyees" were henceforward to pay their revenue directly to the Collector and to be for ever under the Company's immediate authority"; but that they would in due course restore the son of the zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees, which are hereby declared separated from the zamindari for ever" This restoration was made in 1803, after the death of the rebellious zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the Bissoyees," "the possessions of the Bissoyees," and "all lands or russums or fees heretofore appropriated to the support of police establishments.' In a suit against the Government by the zamindar of Parlakimedi in 1894, claiming proprietary

EVIDENCE ACT (I OF 1872)—*concluded.*

right in, and possession of, the Maliahs as appertaining to the zamindari:—*Held*, that the proper construction of the exception was that it included the Maliahs, and not only the lands occupied and cultivated by the Bissoyees; the Maliahs therefore did not pass under the re-grant, but remained the property of Government as they had done since the forfeiture. In 1823 the Government transferred the Bissoyees, who had been placed in 1800 under the Collector, to the zamindar, and directed that they should be required to pay their quit-rents to him: *Held*, that that arrangement conferred no proprietary right in the Maliahs upon the zamindar, who incurred thereby no liability for the quit-rents of the Bissoyees, but had only to account for what he succeeded in collecting. In 1835 certain villages, not within the Maliahs, were granted to the zamindar in consideration of his undertaking liability for the quit-rents of the Bissoyees: *Held*, that such an express grant excluded the inference that the zamindar obtained any proprietary right in the Maliahs. The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision. From 1861 to 1893, in consequence of the disability or incapacity of successive zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Maliahs, as if they belonged to the zamindari, worked the forests on the Maliahs and constructed roads through them at the expense of the zamindar; and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest: *Held* (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel, which would prevent the defendant from denying the plaintiff's title. GOURA CHANDRA GAJAPATI NARAYANA DEO *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1905).
I. L. R. 28 Mad. 130

——— s. 132.

See DEFAMATION.
I. L. R. 32 Calc. 756

——— s. 132.

See PENAL CODE, s. 500. 9 C. W. N. 911

——— *Document put in without objection*—If a document is inadmissible in evidence, objection can be taken to its admissibility at any stage of the case, even if it has been duly proved. But an objection as to the mode of proof of a document is one which should be taken at the time when the document is attempted to be put in. *Kanto Prasad Hazari* v. *Jagat Chandra Dutta, I. L. R. 23 Calc. 535*, distinguished. MADHABI SUNDARI DASYA *v.* GAGANENDRA NATH TAGORE (1905) . 9 C. W. N. 111

EXECUTION.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 244 I. L. R. 32 Calc. 1031

See DECREE . I. L. R. 32 Calc. 680

EXECUTION OF DECREE.

See CIVIL PROCEDURE CODE—

ss. 13, 206, 244, 278, 283, 285, 295, 310 A, 313, 317, 331.
I. L. R. 27 All. 56, 148

ss. 132, 155, 158, 194, 263, 325, 440 445, 453, 485, 537, 575, 700, 702.
I. L. R. 29 Bom. 29

See LIMITATION ACT.
I. L. R. 29 Bom. 68

See MORTGAGE . I. L. R. 27 All. 392
9 C. W. N. 201

——— *Mortgage—Decree for sale—Civil Procedure Code (Act XIV of 1882), s. 244, cl. (c)—Jurisdiction.*—A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings, to the property being sold on the ground that it was not the property of the mortgagor. S. 244 (*c*) of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside the effect of a decree. *Sanwal Das* v. *Bismilla Begam, I. L. R. 19 All. 480; Liladhar* v. *Chaturbhuj, I. L. R. 21 All. 277*; and *Hiralal Sahu* v. *Parmeshwar Rai, I. L. R. 21 All. 356*, followed. *Ram Chandra Mukerjee* v. *Ranjit Singh, I. L. R. 27 Calc. 242*, distinguished. KHETRAPAL SINGH ROY *v.* SHYAMA PROSAD BARMAN (1905) . I. L. R. 32 Calc. 265

——— *Security for costs—Sale of properties given as security—Mortgage—Transfer of Property Act (IV of 1882), ss. 67, 99—Costs—Interest on costs.*—As security for the costs of the respondents in appeal to the Privy Council the appellants executed a duly attested and registered bond, whereby they "put certain immoveable properties in security" for such costs. The Privy Council in dismissing the appeal awarded the respondents their costs, who thereupon in execution applied for the sale of the properties comprised in the bond: *Held*, that the effect of the bond was to create a mortgage, and that having regard to s. 99 of the Transfer of Property Act, the properties could not be sold without instituting a suit under s. 67 of the Act. *Girindra Nath Mukherjee* v. *Bejoy Gopal Mukherjee, I. L. R. 26 Calc. 246; Abdul Karim* v. *Salimun, I. L. R. 27 Calc. 190*, and *Gokul Mandar* v. *Padmanand Singh, I. L. R. 29 Calc. 707*, referred to. *Ramji Haribhai* v. *Bai Parvati, I. L. R. 27 Bom. 91; Ganga Dei* v. *Shiam Sundar, All. W. N. 201*, and *Janki Kuar* v. *Sarup Ram, I. L. R. 17 All. 99*, dissented from. *Bans Bahadur Singh* v. *Mughla Begum, I. L. R. 2 All. 604*, and *Shyam Sundar Lal* v. *Bajpai Jainarayan, I. L. R. 30 Calc. 1060*, distinguished. When the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent for the Court executing the order to direct payment of the costs with interest. *Forester* v. *Secretary of State for India, I. L. R. 3 Calc. 161: L. R. 4 I A. 137; Dakhina Mohan Roy* v. *Saroda Mohan*

EXECUTION OF DECREE—continued

Roy, I L. R 23 Calc 857, followed. TOKHAN SINGH v GIRWAR SINGH (1905).
I. L. R. 32 Calc 494

——— *Sale in execution of decree—Setting aside sale—Invalid sales—Want of jurisdiction—Effect on validity of sale—Civil Procedure Code (Act XIV of 1882) s 273*—Where a Court executing its own decree on receiving from another Court an order attaching the decree returned the notice of attachment to the latter Court on the ground that it did not state the amount for which the attachment had been issued and proceeded with the execution and sold certain properties—*Held*, that the Court on receiving the order was bound to comply therewith, and under s. 273 of the Civil Procedure Code it was debarred from proceeding with the execution, unless the bar was removed in one of the ways specified in the section and that the sale was invalid MANIK LAL SEAL v BAYAMALI MUKERJEE (1905) . . . I. L. R. 32 Calc. 1104

——— *Limitation Act (XV of 1877), Sch II, Art 178—Obstruction to execution—Removal by decision in favour of decree holder—Decree holder's right to move the Court—Application to be regarded as a continuation of previous application*—A mortgage decree was obtained against the counter-petitioner on 28th February 1894 On 16th May 1895, the decree-holder assigned the decree to petitioner, who applied for execution on 6th December 1897 That application was struck off and so was one which followed it On 15th June 1898, petitioner again applied for execution but counter petitioner contended that the assignment was for his benefit and that, in consequence petitioner was not entitled to execute the decree. The District Munsif held an enquiry under s 232 of the Civil Procedure Code and dismissed the application being of opinion that counter petitioner's contention was true. Petitioner thereupon brought a suit to establish her claim that the assignment was for her own benefit. On 20th February 1901, the Appellate Court declared that petitioner had obtained a valid assignment of the decree and was entitled to execute it. On 24th November 1902 petitioner filed the present execution petition. On the question of limitation being raised:—*Held*, that the petitioner's right to execute the decree was not barred by limitation on 21th November 1902. The application should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed, as a competent Court has declared. Article 178 was, therefore, applicable, and time had begun to run from the date of the appellate decree declaring petitioner's right to execute, dated 20th February 1901 *Narayana Naidu v Pappi Brahmani* I. L. R 10 Mad 22 overruled. SUPPA REDDIAR v AYYDAI AMMAL (1905) I L R. 28 Mad. 50

——— *Limitation Act (XV of 1877), Sch II, Art 179—Step in aid of execution—Application by decree-holder purchaser for confirmation of sale, if valid—Civil Procedure Code (Act XIV of 1882), s 312*—An application by a decree-holder who has purchased a property in execution of his own decree for confirmation of sale, is not an application to take some step in aid of the execution of the decree within the meaning of Art. 179, Sch. II of the Limitation Act UMESH CHANDRA DAS v SHIB NARAIN MONDUL (1905)
9 C W. N. 193

——— *Limitation Act (XV of 1877), Sch. II Art. 179—Application for execution—not accompanied by copy of decree sufficient to save bar—Step in aid of execution—Construction of statute*—An application for execution presented on behalf of a party entitled to present it, but not accompanied by a copy of the decree as required by the Civil Rules of Practice, is an application "in accordance with law, within the meaning of Art 179, Sch. II of the Limitation Act, as the defect has reference only to an extraneous circumstance. *Sidakshea Raghunath v Ramachandra Chintaman, 6 B L R 894*, dissented from. The provisions of the Limitation Act should receive a fair and not too technical construction. Observations on the construction of statutes. Where the decree is more than one year old and the application prays for the issue of notice under s. 248 of the Code of Civil Procedure to the judgment-debtor, such application in the absence of any provisions prescribing the form, contents or accompaniments of an application for issuing notice, will be a step in aid of execution within the meaning of Art 179, Sch II of the Limitation Act. PACHIAPPA ACHARI v POONJALI SERVAI (1905)
I. L R. 28 Mad. 557

——— *Limitation Act (XV of 1877), Sch II Art 179—"Application in accordance with law"—Application by guardian on behalf of one found to be a major at the time—Jurisdiction of Court to review its own order, when an appeal lay*—An application for execution made by *A* as guardian on behalf of *B*, who was a major at the time the application was made, is not an "application in accordance with law" within the meaning of Art. 179, Sch. II of the Limitation Act, and will not operate as a bar to limitation, though it may perhaps be a good application for other purposes *Tagai Jan v Obaidulla 1 L. R 21 Calc 866*, distinguished. Neither can such an application be considered an application by *B* under s. 235 of the Code of Civil Procedure. A Court can review its own order in execution, although an appeal might have been, but was not preferred. SARAMMA v SESHAYYA (1905).
I. L. R. 28 Mad. 396

——— *Limitation Act (XV of 1877) Sch. II, Art. 179—Application to take a step in aid of execution—Execution petition—Adjournment of sale on application of judgment-debtor consented to by decree holder—Subsequent application within three years of date of adjournment, but more than three years from previous application—Limitation.*—A decree-holder applied for execution of his decree. The last-

EXECUTION OF DECREE—*continued.*

preceding application had been made more than three years before the present one. In that application the decree-holder asked that the properties of the judgment-debtor might be sold. The judgment-debtor then applied for a postponement of the sale, to which the decree-holder consented. The present application was made within three years from the date of the judgment-debtor's application for a postponement of the sale. The sale had, in fact, not been carried out. *Held*, that the application was barred by limitation. The mere consent by a decree-holder to the application made by the judgment-debtor was not "an application" by the decree-holder, within the meaning of Art. 179 of Sch. II to the Limitation Act. *Held* also, that the acknowledgment of indebtedness in the application of the judgment-debtor for a postponement of the sale did not give a fresh starting point for limitation under s. 19 of the Act; nor could a part payment of the principal be relied upon under s. 20, as the same principle applied to ss. 19 and 20. *Kuppusami Chetty* v. *Rengasami Pillai, I. L. R. 27 Mad. 608*, followed. SREENIVASA CHARIAR *v.* PONNUSAWMY NADAR (1905) . **I. L. R. 28 Mad. 40**

———*Limitation Act (XV of 1877), Sch. II, Art. 179—Mortgage—Decree for redemption—Extension of time for payment of the mortgage amount—Execution.*—In a suit for redemption of the mortgage property the decree directed that upon payment of the mortgage amount within six months from its date the decree-holder should take possession of the mortgage property. The decree was affirmed on appeal on the 6th November 1896. The decree-holder failed to pay the amount within the time fixed in the decree. The present application was made on the 15th October 1902 to the Court to have the time extended for three months. The decree-holder's last application to execute the decree was made on the 21st April 1897. *Held*, that the application was barred by limitation. Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by Art. 179, Sch. II of the Limitation Act. *Rungiah Goundan* v. *Nanjapya Row, I. L. R. 26 Mad. 780*, approved. ETYATI POOPARAMBIL BAVA *v.* MATALAKAT KRISHNA MENON (1905) . **I. L. R. 28 Mad. 211**

———*Limitation Act (XV of 1877), Sch. II, Art. 179—"Step in aid of execution"—A "batta memorandum" praying for issue of sale proclamation.*—A so-called "batta memorandum," which applies for the issue of a sale proclamation and on which a sale proclamation is issued accordingly, is a "step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act, although an order for the issue of such proclamation might have been made previously. *Maluk Chand* v. *Bechar Natha, I. L. R. 25 Bom. 639*, distinguished. *Ambica Pershad Singh* v. *Surdhari Lal, I. L. R. 10 Calc. 851*, followed. VIJIARAGHAVALU NAIDU *v.* SRINIVASALU NAIDU (1905) . . **I. L. R. 28 Mad. 399**

EXECUTION OF DECREE—*continued.*

———*Sale not set aside within one year—Civil Procedure Code (Act XIV of 1882), s. 311—Limitation Act (XV of 1877), Sch. II, Arts. 12, 144, 148—Title of purchaser as against mortgagor—Adverse possession—Redemption, right of judgment-creditor—Purchase by.*—The lands in suit were held by the plaintiffs under leases granted by Government for terms of seven years, and renewed from time to time. To a suit brought in 1897 for redemption of the lands, which had been mortgaged in 1878 by usufructuary mortgages, the defence was that the defendants were not mortgagees of the property, but had purchased it at sales in execution of decrees in 1880-81, which could not be set aside, and that the suit was barred by lapse of time:—*Held*, that the purchasers at the sales were mere agents or benamidars of the mortgagees; and that the possession of the property had been that of the mortgagees throughout. No such possession short of the statutory period of 60 years, nor any acquiescence of the mortgagors not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. Nor did the renewal of the leases or the making of a new settlement in the names of nominees of the mortgagees alter the real title to the lands. There had been no possession adverse to the plaintiffs, and the suit was, therefore, not barred by limitation. It appeared that there had been errors and defects in procedure both previous to the decrees of 1880-81 and in the execution proceedings and some of the parties had not been properly represented:—*Held*, that though the sales could not now be set aside or treated as void by reason of mere irregularities of procedure in obtaining the decrees or in execution of them, yet the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees or sales under them were void without any proceedings to set them aside. *Kishen Chunder Ghose* v. *Ashoorun, 1 Marsh. 647*, followed. The question whether an estate is or is not properly represented in a suit is not a mere question of form, but one of substance. One of the decrees, in execution of which the sales took place, was made on an award after reference of the suit to arbitration and the other was a decree on a compromise of the suit:—*Held*, that there had been no erroneous decision, ruling, or exercise of the discretion of the Court in a matter in which it had jurisdiction. *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337: L. R. 27 I. A. 216*, distinguished. The Lower Appellate Court having given a decree for redemption of the whole of the property, —*Held*, that under the above circumstances and the fact that the suit, which was compromised, was one for a debt not secured by a mortgage, redemption should be allowed only of the shares of those parties who had not been properly represented in the suits. KHIARAJMAL *v.* DAIM (1905). **I. L. R. 32 Calc. 296**

———*Rent—Payment to prevent sale—Bengal Tenancy Act (VIII of 1885), ss. 3, 171.*—Where a decree made in a suit for rent was in th main one for rent, although it included other sum

EXECUTION OF DECREE—*continued*

which were not strictly rent, within the meaning of the Bengal Tenancy Act, and in execution thereof the tenure in area was ordered to be sold under Chapter XIV of the Act and advertised *Held*, that the holder of an under tenure liable to be avoided would be justified in making a payment to prevent the sale of the superior tenure, and having made the payment, would be entitled to the rights, which are given to a person who makes a payment under s 171 of the Bengal Tenancy Act. A lease provided that a certain sum was payable by a tenant direct to the landlord as *malikana* and certain other sums were payable by the tenant for Government revenue and other demands, which the landlord was himself bound to pay *Held*, that the latter sums, though not actually payable to the landlord, were payable for the use and occupation of the land held by the tenant, and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord, and came within the definition of rent in s 3 of the Bengal Tenancy Act JNANADA SUNDARI CHOWDHRANI v ATUL CHANDRA CHAKRAVARTI (1905) I. L. R. 32 Calc 972

——— *Decree for rent—Tenure or holding sale of—Landlord and tenant—Bengal Tenancy Act (VIII of 1885), s 165*—A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under s 165 of the Bengal Tenancy Act to sell the tenure in execution of the decree, although he recognized the fact that the tenants had subdivided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent. *Tarini Proud Roy v Narayan Kumari Debi, I. L. R. 17 Calc 301* referred to and explained. SURBO LAL v WILSON (1905) . I. L. R. 32 Calc 680

——— *Attachment of debts due to judgment debtors—Improper realization of such debts by third party—Application to compel third party to disgorge—Limitation—Contempt of Court*—Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who, in defiance of the attachment, proceeded to collect some of them for their own benefit. The plaintiffs, having obtained a decree in their suit, applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order *Held*, that this was not an application in execution of their decree, but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules provided for applications to execute decrees did not apply to it GOBU RAM v SURAJMAL (1905) . I. L. R. 27 All. 378

——— *Civil Procedure Code (Act XIV of 1882), ss 244, 545—Execution of decree—Order refusing stay—Appeal—Deliberate exercise of discretion by lower Court.*—An order refusing to stay execution of a decree under s 545 of the Civil Procedure Code (Act XIV of 1882) is not appealable *Musaji Abdulla v Damodardas, I. L. R. 13 Bom. 279*, doubted. Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court RAMCHANDRA v BALMUKUND (1905) . . . . I. L. R. 29 Bom. 71

EXECUTION OF DECREE—*continued*

——— *Decree—Fraud upon the Court*—*B* (defendant) obtained two decrees against *E*, one for R150 and the other for R750, the latter amount being payable by yearly instalments of R250 each. About the same time *K* obtained a decree against *E* for R47. *B* presented a *darkhast* for the recovery of R182 7 9 under this first decree; and *K* also about that time presented his *darkhast* to execute his decree. *B* then presented another *darkhast* in respect of money due under his second decree, in which he prayed for rateable distribution under s. 294 of the Civil Procedure Code (Act XIV of 1882). In his first *darkhast* *B* prayed for attachment and sale of the property belonging to *E*; and the property was accordingly placed under attachment. Subsequently *E* made an application to the Court to allow him one month's time to raise money in order to satisfy *K*'s decree and also the first decree of the defendant. The Court granted him one month's time and issued to him a certificate, as required by s 305 of the Civil Procedure Code (Act XIV of 1882), which expressly directed that the amount realized by sale or mortgage of the property should be paid into Court and not to the judgment debtor. The property in dispute was sold by *E* to the plaintiff privately; and the plaintiff made two applications to the Court, in which he stated that he had produced before the Nazir an amount of purchase money sufficient to satisfy *K*'s decree and the first decree of *B*, and prayed that the property might be released from attachment. The Court granted the applications; but *B* on the same day applied to the Court asking the Court not to confirm the sale and withdraw the attachment, as the sale to the plaintiff was made to defeat his later decree. The Court held the sale to be fictitious and fraudulent. *B* then got the property attached and sold in execution of his later decree and purchased it himself with the permission of the Court. The plaintiff, shortly after this, filed a suit against *B* to recover possession of the property *Held* that under the circumstances it was clear that a fraud was practised upon the Court and that therefore the purchase by the plaintiff was vitiated by the fraud. A purchase, which has received the sanction of the Court, will not be set aside upon slight grounds, but if the approval of the Court is obtained by misrepresentation, or by withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud and act accordingly *Boswell v Coaks (1884), 27 Ch D 424 at p 454*, followed. ATMARAM GANOJI v BALKRISHNA MAHADJI (1905)
I. L. R. 29 Bom 615

——— *Executor de son tort, liability of, under Hindu Law, when there is a legal representative*—

EXECUTION OF DECREE—*continued.*

Power of, to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action—Creditor, form of suit by.—When *A* on the death of *B* pays off a debt due to *C* by *B*, which he had guaranteed, and later on in the same day, removes goods belonging to *B*'s estate, *A* becomes liable as *executor de son tort*. The Rule of English Law that no liability as *executor de son tort* can arise, when there is another personal representative, does not apply in India. *Magaluri Garudiah* v. *Narayana Rungiah, I. L. R. 3 Mad. 359*, referred to. An *executor de son tort* cannot plead *plene administravit*, if he retains the assets for his own use or pays his own debt. In this case *A* became a creditor of the estate, when he paid off the debt, and when he removed the goods he paid a debt due to himself and not to *C*. The consent by the heir to the appropriation by the *executor de son tort* will not be a defence to a creditor's action. Where there is an *executor de son tort*, a creditor may sue for his debt and is not confined to an administration action. NARAYANASAMI PILLAI v. ESA ABBAYI SAIT (1905) . . . I. L. R. 28 Mad. 351

——— *Administrator General's Act (V of 1902), s. 4, cl. 2—Indian Trusts Act (II of 1882), s. 72—Discharge by Court of an executor—Vesting of property in the continuing executor.*—The Court has power to discharge an executor on his own application, if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor, it only relieves him from the duties of his office from the date of the discharge. *Ex parte* AMERCHAND MADHOWJI (1905) . . I. L. R. 29 Bom. 188

——— *Failure to produce fund at appointed time—Advisory duty—Appointment of an agent—Degree of care in the appointment—Want of diligence—Breach of duty—Loss caused to the estate—Liability of executor—Trusts Act (II of 1882), s. 30.*—When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie* they are liable for the loss which thereby accrues. One who undertakes a duty is bound to know what his duty requires. Where a testator by his will committed the management of the property to his widow along with two out of the five executors including the widow, it is not open to one of the executors, who was not specifically entrusted with the management, to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many, that votes of the majority of the executors governed, and that the real management was entrusted to two of the executors in co-operation with the widow. In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and supervision of the agent, and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss must fall on the executor. The indemnity clause of s. 30

of the Trusts Act (II of 1882) casts the onus of proof on those who seek to charge a trustee with loss arising from the default of an agent, when the propriety of employing an agent has been established. But where there is a clear breach of duty in the employment and supervision of the agent, the liability of the trustee for breach of trust arises. LAKHMICHAND v. JAI KUVARBAI (1905) . . I. L. R. 29 Bom. 170

——— *Hindu Law—Ancestral property—Trust by the father—Trusts Act (II of 1882), s. 6—Will—Legatees.*—Certain legacies were devised by the will to relatives of the testator and others. *Held*, that, as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI v. BAI MANI (1905) . . . . I. L. R. 29 Bom. 351

——— *Decree on mortgage against minors—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money-decree—Title of the purchaser in execution of the decree on the mortgage—Lis pendens—Stay of execution.*—A certain house belonged to a joint family consisting of two brothers Nathubhai and Dayabhai and their cousin Bhagubhai. A mortgage of the house was said to have been effected by Bhagubhai during the minority of his two cousins. The mortgagee got a decree for the recovery of the mortgage-debt from the mortgaged property. An appeal was presented on behalf of the minors on the ground that they were not bound by the decree and pending the appeal the mortgaged property was sold in execution of the decree and purchased by the defendant's father. Then the appeal came on and the decree was varied as to the minors by dismissing the suit against them and their property. Subsequently the plaintiff obtained a money-decree against Nathubhai and attached in execution thereof what he claimed to be his judgment-debtor's ¼th share in the house. The attachment was, however, raised at the instance of the defendants, who relied on their father's Court-purchase and contended that the judgment-debtor Nathubhai had no claim to the house. The plaintiff thereupon brought the present suit for a declaration, affirming his right to attach. *Held*, confirming the decree, which dismissed the suit, that the title of the defendants' father as purchaser at the Court-sale must prevail. Though the decree on the mortgage was varied in appeal by dismissing the suit as against the minors and their property, still as the defendants' father purchased in execution of the decree pending the appeal, his title could not be impugned in the absence of fraud, collusion or any other disqualifying circumstances. *Zain-ul-Abdin Khan* v. *Muhammad Asghar Alí Khan, I. L. R. 10 All. 166*; *Tommy* v. *White, 3 H. L. C. 49*, referred to. The doctrine of *lis pendens* does not defeat a purchaser under a decree or order for sale, when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that law does not allow litigant parties to give to others pending the litigation rights over the

EXECUTION OF DECREE—*continued.*

property in dispute so as to prejudice the opposite party *Bellamy* v *Sabine*, 1 De G & J, 566; *Wigram* v *Buckley*, 3 Ch 483, referred to Where an appeal is presented from a decree directing the sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds SHIVLAL BHAGVAN v SHAMBHUPRASAD (1905) I. L. R. 29 Bom 435

——— *Decree—Execution—Execution in excess of decree—Court's inherent power to make restitution upon application—Regular suit not necessary*—Plaintiff obtained a decree in the Court of first instance for confirmation of possession, and this decree was reversed on appeal. In the meantime in proceedings taken to execute the decree of the first Court, plaintiff had obtained possession On defendant applying for restitution of possession plaintiff contended that in putting plaintiff in possession the Court had gone beyond the terms of the decree, and the defendant's remedy was by bringing a regular suit *Held*, overruling the contention that the Court, which was induced to wrongly give possession, had inherent power to order restitution *Raja Singh* v *Koolod p Singh*, *I L R 21 Calc 989* and *Mookoond Lal* v *Mahomed Sami Meah*, *I L R 14 Calc 484* relied on. DINESH PROSHAD v SHIVNAR CHOWDHRY (1905) 8 C W N 361

——— *Limitation Act (XV of 1877), Sch II, Art. 179—Suspension of execution proceedings—Revival of pending execution suspended not by act or default of the decree holder*—On 24th August 1888 an application was made for execution of a decree, and on 18th December 1888 execution was allowed to proceed. On 20th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December an order was made that, as the decree-holder had not made a deposit on account of the transfer to the Collector, 'therefore in default of prosecution on the part of the decree-holder, the record be not sent to the Collector's Court." On 15th February 1890 an appeal had been preferred to the High Court from the order of 18th December 1888 allowing execution to proceed, and the High Court reversed that order on 7th January 1890, but on appeal to the Privy Council the order allowing execution was restored on 12th December 1894. *Held*, by the Judicial Committee (affirming the decision of the High Court) that an application for execution made on 23rd November 1893 was one to revive and carry through a pending execution suspended by no act or default of the decree holder, and not an application to initiate a new one, and was therefore not barred by limitation. The order of 20th November 1889 was one in aid of execution and that of 23rd December was in no sense a final order; if the appeal from the order of 18th December 1888 and the proceedings up to the order of the Privy Council of 12th December 1894 had not intervened there was nothing in its terms to preclude the decree-holder from coming again to the Court and,

EXECUTION OF DECREE—*continued*

after satisfying the conditions indicated in the order, obtaining the transmission of the case to the Collector's Court KAMAR UD-DIN AHMAD v JAWAHIR LAL (1905) I. L. R. 27 All. 334 s.c. L. R. 32 I. A. 102

——— *Sale of property not included in decree—Sale confirmed without objection on part of judgment debtor—Private sale by heirs of judgment debtor to a third party—Rights of purchasers inter se*—In execution of a decree for sale on a mortgage the interest of the judgment debtor in the whole of certain property, *instead* of in half only, which was all that was mortgaged, was sold. The sale was *confirmed*, possession was delivered and mutation proceedings took place in favour of the purchaser The judgment-debtor, though having full knowledge of these proceedings, took no objection but allowed the purchaser's name to be recorded in respect of the whole property Subsequently the heirs of the judgment-debtor sold half of the property in question to one *F* who brought a suit to recover possession thereof from the auction purchaser *Held*, that *F* inasmuch as, if he had made any sort of inquiry he would have become aware of the true state of the title to the property, which he was purchasing, could not be regarded as a *bona fide* purchaser, and was not in equity entitled to succeed as against the auction purchaser BALDEO PRASAD v FAKIR UD-DIN (1905) I. L. R. 27 All. 62

——— *Partition suit—Decree—Application for execution by defendant—Order for execution subject to payment of Court fees*—A defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that on the defendant's "paying the Court-fees, the matter will be sent to the Collector for partition." The *decree* itself imposed no such term as to Court fees. The *defendant* having appealed against the said *order*: *Held* reversing the order, that the executing Court having regard to the terms of the decree was not justified in requiring payment of an additional Court fee on the plaint. MIR SAHABUDIN v NURUDIN (1905) I. L. R. 29 Bom. 70

——— *Res judicata—Effect of non-appearance, when notice silent as to relief claimed—Final decision*—*A* applied in execution for restitution of money with interest thereon paid to *B* under a decree, which was subsequently reversed. The notice to *B* did not specify the nature of the claim and an *ex parte* order allowing the claim was made The application, however, was dismissed for default in payment of process fees and *A* subsequently put in a similar application. B appeared and objected to the interest claimed, which was 12 per cent. The Subordinate Judge allowed the interest, which, however on appeal to the District Court, was reduced to 8 per cent. On appeal to the High Court *Held*, that the order of the Subordinate Judge allowing interest was a final order, as it dealt with the only question at issue and did not contemplate a further order and that the appeal to the District Judge was not premature *Venkatagiri Ayyar* v *Sadagopacharlar* (Appeal No. 60 of 1900 and Civil

EXECUTION OF DECREE -*concluded.*

Miscellaneous Appeals Nos. 105 and 109 of 1902 unreported), distinguished. *Held, also,* that, as the notice to *B* was silent as to the nature of the claim, the first order granting *A's* application *ex parte* had not the force of *res judicata* so as to estop *B* from disputing the claim in subsequent proceedings. Knowledge of the nature of the claim can be presumed only when the application is for execution of a decree or order directing a thing to be done. *Sheik Budan* v. *Ramchandra Bhunjgaya, I. L. R. 11 Bom. 537,* and *Vappakandu Maracayan* v. *Hamid Beevi Ammal, Civil Miscellaneous Appeal No. 25 of 1903, unreported,* referred to. NARAYANA PATTAR v. GOPALAKRISHNA PATTAR (1905).

I. L. R. 28 Mad. 355

EXECUTION SALE.

See ADMINISTRATOR.

See CIVIL PROCEDURE CODE.

EXECUTOR.

See ADMINISTRATOR GENERALS ACT.

See EVIDENCE.

EXPERT OPINION.

See VALUATION OF LAND.

EXPRESS MALICE.

See LIBEL.

F

FACTORIES ACT (XV OF 1881).

——— ss. 12, 15 (1) (e)—*Fencing machinery —Manager—Occupier—Liability.*—The accused, who was the manager of a ginning factory at Dhulia, resided in a part of the premises on which the factory stood. He was charged under s. 15 (*1*) (*e*) of the Indian Factories Act (XV of 1881) with having neglected to fence certain machinery in the factory; and he was convicted and sentenced by the Magistrate. On appeal the Sessions Judge reversed the conviction and sentence and acquitted the accused. On appeal by the Government of Bombay against this order of acquittal: *Held,* that the accused was not liable to conviction under s. 15 (*1*) (*e*) of the Indian Factories Act (XV of 1881), since the manager of a factory cannot be said with truth to have been the occupier thereof. EMPEROR *v.* RAMPRATAP (1905).

I. L. R. 29 Bom. 423

FALSE CHARGE.

See CRIMINAL PROCEDURE CODE.

FALSE INFORMATION.

See CRIMINAL PROCEDURE CODE.

FATAL ACCIDENTS ACT (XIII OF 1855).

——— *'Representative of the deceased,' who are—The right under the Act is distinct in each and is a several, not joint, right—Limitation Act (XV of 1877), ss. 7, 8, Art. 21, Sch. II—Representatives under Act XIII of 1855 not persons entitled to sue within the meaning of s. 7 nor 'joint creditors' or joint claimants within the meaning of s. 8 of the Limitation Act—Construction of statute.*—The word 'representative' in Act XIII of 1855 does not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian. Under Art. 21, Sch. II of the Limitation Act, the suit must be brought within one year from death, unless the bar is saved by s. 7 or 8 of that Act. The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest. *Pym* v. *The Great Northern Railway Co. 4 B. & S. 396.* The beneficiaries are in the position of joint decreeholders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply for execution conferred on one or more of several joint decreeholders by s. 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of s. 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit. The principle in *Periasami* v. *Krishna Ayyan, I L. R. 25 Mad. 431,* followed. They are also not joint creditors, nor joint claimants under s. 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process. *Ahinsa Bibi* v. *Abdul Kader Saheb, I. L. R. 25 Mad. 26,* distinguished. Ss. 7 and 8 of the Limitation Act must be held to apply to suits under Art. 21, if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding, in the absence of express words, that they do not so apply. JOHNSON v. MADRAS RAILWAY COMPANY (1905).

I. L. R. 28 Mad. 479

FISHERY.

——— *Fishery in navigable river—Dob a left by recession of river—Grantees of fishery, rights of—Communication with main channel at all seasons.*—If a navigable river shifts its course leaving lakes, *dobas,* or sheets of water, in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes, *dobas,* etc., so long as these latter remain in communication with the main channel at all seasons of the year. *J. J. Grey* v. *Anund Mohan Moitra, W. R. Gap No, p. 108,* relied on. *Krishnendro Ray Chowdhry* v. *Surnomoyee, 21 W. R. 27;* and *Tarini Chara*

FISHERY—*concluded*

Sinha v *Watson & Co.*, *I L R 17 Calc 963*, referred to HEM CHANDRA CHOWDHURY v JAGADINDRA NATH RAY (1905)
9 C W N 634

FIXTURE.

——— *Landlord and tenant—Lease—Assignment of lease—Privity of contract—Liability to repair—Transfer of Property Act (IV of 1882), s 2*—The word *fixture* is one of common use in English law, but in India the word is not so familiar, and the maxim, '*quicquid plantatur solo solo cedit*,' on which the law of England as to fixtures *seems* to have been originally founded, has never received so wide an application here as there. For anything to be a *fixture* it must be "attached to the earth" as that expression is defined in s. 3 of the Transfer of Property Act. Where the occupiers of premises continue in possession in the belief common to them and the owner of such premises that they hold under the terms of a lease which had never been assigned to them by the original lessee and which had expired, they are bound to carry out such covenants as to repairs, etc., as would have to be performed under the lease within a period of similar duration to that during which they hold possession, their liability being based on the footing of a tenancy that commenced at the expiration of the lease, and not on any privity of contract or estate, whether legal or equitable, created by the lease. CHATTERJEE v BEVERLEY (1905) . I L R 29 Bom. 323

FORD

See PUBLIC NUISANCE

FORECLOSURE.

See MORTGAGE

See TRANSFER OF PROPERTY ACT

FOREST ACT (VII OF 1871)

——— *Land Acquisition Act (I of 1894)—Distinction between the two Acts*—The most important distinction between the Land Acquisition Act (I of 1894) and the Indian Forest Act (VII of 1871) lies in this—that whereas in the Land Acquisition Act the Legislature has expressly constituted the Local Government the sole arbiter as to what land shall be acquired for a public purpose, the Indian Forest Act gives the power to afforest subject to conditions as to the fulfilment of which the Local *Government is* given *no* express power to decide. BALWANT RAMCHANDRA v SECRETARY OF STATE (1905) I L R 29 Bom 480

——— ss. 3, 4, 10—"*To constitute a reserved Forest*"—*Local Government powers of, regarding waste land—Ultra vires order—Nullity—Civil Courts—Jurisdiction.*—S 3 of the Indian Forest Act (VII of 1871) does not make the exercise of the power conferred dependent on the opinion or decision of the Local Government, but upon a question of fact It runs "the Local Government may constitute any forest land or waste land, which is the property of Government, etc." If the land actually fulfils that condition, Government can exercise the powers, not otherwise The test is, not what appears to the Local Government, but what is the actual fact, and as the enabling section gives the Local Government no power to decide that fact, it can only be decided by recourse to the Courts, which have authority finally to decide on questions of law and fact wherever their jurisdiction is not expressly barred by the Legislature. The power in s. 4 of the Indian Forest Act (VII of 1871) to appoint an officer to inquire and determine as to rights is limited to land, which it is proposed to constitute reserved forest and "to constitute a reserved forest" is a phrase defined in s. 3 And under that definition, the constitution of a reserved forest connotes as the object forest or waste land only The specified character of the land is an essential part of the Act defined. According to the definition the phrase "to constitute a reserved forest" means to convert land by notification from forest or waste The land, therefore, to which a proposal under s. 4 relates, must be forest or waste land, and it is only in respect of such land that the officer appointed has power to inquire and determine. When the land is forest or waste, the Forest officer has the power to inquire into and determine as to rights of way or pasture, forest produce or water courses, and he may admit or reject such claims with finality, because he is dealing with land in respect of which he has a duly delegated jurisdiction. It is possible there may be other rights in or over land which may render it desirable for Government to acquire full ownership and for such cases s. 10 of the Indian Forest Act (VII of 1871) provides, without, however, extending the application of the section to any land incapable of constitution as reserved forest. The provisions of the Indian Forest Act (VII of 1871) do not bar the jurisdiction of the Court to decide whether the land in suit is or is not forest or waste land and whether, if it be not such land, the plaintiffs are entitled to the occupation thereof. BALVANT RAMCHANDRA v SECRETARY OF STATE (1905) . I L R 29 Bom. 480

FOREST LANDS.

——— *Claims for hills—Village and land made over to claimant's ancestor by Government—Hills situated within immemorial boundaries of village—Right of inamdar irrespective of evidence of actual enjoyment—Necessity for proving adverse possession against Government*—A jaghirdar preferred a claim to certain hills It appeared that in 1842 the uncontrolled management of a certain village and pieces of land was made over to the ancestor of the present claimant. Prior to such handing over, Government officers had been in possession on behalf of the Inamdar It was not alleged that, when such possession was handed over the hills in question were excepted; and it was not disputed that the hills were within the immemorial boundaries of the village—*Held*, that upon these facts, apart from any evidence of actual

FOREST LANDS—*concluded.*

enjoyments by the Inamdar, he should be held entitled to the hills. *Held also,* that it was not necessary for the claimant, in these circumstances, to prove adverse possession as against Government. AJAJUDDIN ALLI KHAN *v.* SECRETARY OF STATE FOR INDIA (1905) . . I. L. R. 28 Mad. 69

FORFEITURE OF PROPERTY.

See LANDLORD AND TENANT.
9 C. W. N. 928

——— *Parlakimidi, zamindari of—Forfeiture—Re-grant—Maliahs or hill tracts, retained by Government—Bisovees service tenure holders under Government—Nature of tenure—Kattubadi or quit rent—Savares, inhabitants of hill tracts, position of—Zamindari charged with payment of Kattubadi—Ownership, if passed to zamindar—Adverse possession—Acquiescence under mistake—Estoppel—Evidence Act (I of 1872), s. 115.*—Prior to the forfeiture by Government of the Parlakimidi zamindari in 1800, the *Maliahs* (certain hill tracts to the north of the zamindari) formed part of the zamindari. The inhabitants of these hill tracts, the *Savaras,* were once a turbulent people and in order to control them and to defend the passes to the plains, the country was divided into *Muttas* or forts and each placed under the control of a local chief or *Bisoyee.* The *Bisoyees* held the *Muttas* on a mere service tenure paying an annual sum to the zamindar by way of *Kattubadi* or quit-rent—an arrangement not unlike that which prevails in other hill tracts in India. In 1802, the zamindari of Parlakimidi was re-granted to the zamindar in permanent settlement, but Government advisedly retained possession and control of the "lands held by the *Bisoyees.*" *Held,* that by this and similar expressions were meant the entire *Muttas,* which made up the *Maliahs* and not merely the lands, under the direct cultivation of the *Bisoyees,* inasmuch as the benefits enjoyed by them included not only those lands, but also fees and other dues received by them from the *Savaras* throughout the whole of the *Muttas. Held further,* that the proprietary right in the *Maliahs* did not pass to the zamindar, when the *Maliahs* were again placed under the control of the zamindar in 1823 and the *Bisoyees* required to pay their quit-rent through him, and when again in 1825, in consideration of a grant to the zamindar of certain villages situated outside the *Maliahs,* the zamindari was charged with the tribute payable by the *Bisoyees* to Government. From 1830 to 1890 the zamindari had been managed by the Court of Wards. During the whole or a part of this period the Court of Wards worked the forests of the *Maliahs* for the benefit of the zamindari in the mistaken belief that it belonged to the zamindari, and other Government officials acquiesced therein. The Government officials under the same mistake also encouraged the expenditure of zamindari funds upon the making of roads in the *Maliahs.* But on the first occasion that a claim of ownership was distinctly put forward by the zamindar it was repudiated by Government. *Held,* that the Courts in India were right in holding that the zamindar had failed to make out a title by adverse possession. *Also,* that these facts did not estop the Government from claiming ownership of the *Maliahs.* GOURA CHANDRA GAJAPATI NARAYANA DEO MAHARAJAULUN GARU *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1905) . . 9 C. W. N. 553
I. L. R. 28 Mad. 553
L. R. 32 I. A. 53

FORFEITURE OF PROPERTY—*concluded.*

FRAUD.

See CIVIL PROCEDURE CODE, s. 244.
I. L. R. 27 All. 704

See ESTOPPEL BY JUDGMENT.
I. L. R. 32 Calc. 357

See MORTGAGE.

See SALE FOR ARREARS OF REVENUE.
I. L. R. 32 Calc. 111

G

GAMBLING.

——— *Bombay Prevention of Gambling Act (Bombay Act IV of 1887), ss. 3, 4 (a)—Instrument of gaming—Single page of paper used for registering wagers.*—The expression "instruments of gaming" as defined in s. 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) includes a single page of paper used for registering wagers. EMPEROR *v.* LAKHAMSI (1905).
I. L. R. 29 Bom. 264

——— *Bombay Prevention of Gambling Act (Bombay Act IV of 1887), ss. 3, 4, 12—Gambling in a machhwa—Public place—Bombay Harbour.*—The accused, fourteen in number, chartered a *machhwa* (boat), and having got it anchored in the Bombay Harbour a mile away from the land, carried on gambling there. For this they were convicted of an offence under s. 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) for gaming in a public place. *Held,* that the accused were not guilty of an offence under s. 12 of the Act, since they cannot be said to be gambling in a public place. *Per* BATTY, *J.*—The word "place," which is patient of many different meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus in s. 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) or in s. 3 of 36 and 37 Vict., c. 38, in connection with such words as roads, streets, and thoroughfares, it has a very different meaning from that which it bears in s. 4 of the Act, and from that given to it in connection with s. 3 of 16 and 17 Vict., c. 119, by judicial decisions. The mischief aimed at in s. 4 of the Act is a mischief clearly distinct from that aimed at in s. 12 of the Act. In the former, the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where

GAMBLING—*contd.*

gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the latter the offence is not that the individual members are making a profit at all, but simply that they are carrying on their gambling, which such publicity that the ordinary passer-by cannot well avoid seeing it and being encouraged—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public would seem to constitute the gravamen of the offence. S. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) aims at gambling in a public place or thoroughfare ordinarily with no screening or protection from the public view where there is voluntary publicity. EMPEROR *v.* JIVTA ALLI (1905).

I. L. R. 29 Bom 390

———— *Gambling Act (Bombay Act IV of 1887) ss. 4, 5, 7—Common gaming house—Jamat khana of the Borah community.*—The accused were found playing for money with cards in a building ordinarily used as a Jama khana but accessible to such members of the Borah community as have no place to live in or are too poor to afford the rent of a room. This place was frequented by the petitioners and others, and instruments of gaming were found there when the accused were arrested. The Magistrate convicted the accused of offences under ss. 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). *Held*, that it was open to the Magistrate to rely on the presumption which under s. 7 of the Act might be drawn, that the place was used as a common gaming house, unless the contrary was made to appear by the evidence before him. There was, therefore, no ground to interfere in revision with the convictions under s. 5 of the Act. *Held*, further, that no presumption arose under s. 7 of the Act that the place was "kept" by any person as a common gaming house; the conviction under s. 4 was therefore wrong. In order to constitute an offence under s. 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) "keeping a common gaming house," it is necessary to show in the first place that the person charged with that offence is the owner or occupier or a person "having the use" of the place alleged to be kept as a common gaming house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there. EMPEROR *v.* WALLI MAHOMED (1904)

I. L. R. 29 Bom 226

GAMING HOUSE.

See GAMBLING.

I. L. R. 29 Bom. 226

GENERAL CLAUSES ACT (X OF 1897).

———— *s. 3, cl. (52)—Signature—Thumb impression—Criminal Procedure Code (Act V of 1898) s. 164.*—A thumb mark affixed to a confession by an accused who is able to write his name is not a signature within the meaning of s. 3, cl. 52 of the General Clauses Act or s. 164 of the Criminal Procedure Code. SASHANKA LAL *v.* EMPEROR (1905)

I. L. R. 32 Calc 550

GHATWALI TENURE.

———— *Ghatwali tenure—Inalienability—Permanent or Non-Permanent*—A ghatwali tenure existed from before the grant of the Dewani to the East India Company and for many years subsequently, from father to son. It was held upon payment of quit-rent and the performance of ghatwali services; such quit-rent was paid at a fixed amount from a time long anterior to the Permanent Settlement and was recognised at the time of the settlement, when the lands were included with the mal lands of the zamindari and the revenue was assessed upon the footing that the quit-rent was fixed in perpetuity. *Held*, that the tenure was not merely heritable but was permanent and the holder was bound to perform the services and that a tenure of this description could not be determined or resumed by the zamindar or the Government on the ground that the services were no longer necessary or had been dispensed with. *Kustodeep Narain Singh v. Mahadeo Singh, B. L. R. Sup. Vol. 237, 6 W. R. 177 (1866)* followed. If it be one of the incidents of a ghatwali tenure, either under the original grant or engrafted on it by usage, that, when the ghatwal becomes incapable of personally performing the services, a deputy (preferably the next successor) may be appointed to act on his behalf by the Magistrate, it does not follow that an incapacity on the part of the deputy to discharge adequately the duties incidental to the office operates as a forfeiture of the proprietary right of the principal. Where during the lifetime of a ghatwal his son, who was appointed deputy, was dismissed, *Held*, that the dismissal of the son did not amount to the dismissal of his father, and that after the father's death the son was entitled to succeed, although during his father's lifetime he had been dismissed while acting as the deputy of his father. JOGESHWAR NARAIN SINGH *v.* KALI CHARAN ROY (1905)

P. C. W. N. 665

GIFT

See ENDOWMENT.

See HINDU LAW.

See MAHOMEDAN LAW.

See PRACTICE I. L. R. 29 Bom 139

———— *Mahomedan Law—Possession, transfer of by the donor—Its equivalent of a share by a Mahomedan in the property of the deceased—Valuable consideration—Transfer of Property Act (IV of 1882) s. 53—Fraudulent transfer—Good faith.*—In fact into the action of the holder in obtaining the certificate of guardianship to the property of a Mahomedan minor under the

GIFT—*concluded.*

Guardian and Wards Act (VIII of 1890), *M*, the uncle of the minor, relinquished in favour of the minor, the share to which he was entitled in the property of his deceased brother, the father of the minor girl. The certificate was duly obtained by the Collector. The plaintiff, a judgment-creditor of *M*, then sued the minor for a declaration that *M's* share in the property of his brother, which he had relinquished, was liable to attachment and sale in execution of his decree. The lower Court decreed the plaintiff's claim on the grounds that the relinquishment was not valid and binding upon the donor under the Mahomedan Law, since being a gift it had not been accompanied and perfected by possession and that it was void against *M's* creditors under s. 53 of the Transfer of Property Act (IV of 1882), because it had been made with intent to defeat, delay or defraud them. *Held*, that the relinquishment by *M* of his share in the property of his brother was not a gratuitous transaction, but was supported by valuable consideration, since as consideration for the Collector's undertaking the responsibility of administrator of the minor's property, he agreed to relinquish his share to the minor: the relinquishment was not a mere gift, but was supported by consideration, which the law regards as valuable and that, therefore, the rule of Mahomedan Law, which requires that a gift must be accompanied by possession to render it valid and binding upon the donor, did not apply to the transaction. MAHAMMADUNISSA BEGUM *v.* J. C. BACHELOR (1905).

I. L. R. 29 Bom. 428

GOVERNOR IN COUNCIL.

——— *Court of Agent of Governor—Appeal to Governor in Council—Dismissal of suit on ground of political expediency—Legality—Res judicata—Jurisdiction, want of—Consent of parties—Act XXIV of 1839, ss. 2, 3, 4—Rules XXI and XXII.*—A suit instituted in the Court of the Agent to the Governor at Vizagapatam was, upon application to the defendant and without opposition from the plaintiff, transferred by the High Court to the District Court. The District Court dismissed it on the ground that no sufficient evidence had been given to establish the plaintiff's case. Subsequently the High Court decided that it had no jurisdiction to order such a transfer and the consent of parties could not confer jurisdiction. The plaintiff thereafter instituted a fresh suit in the Agent's Court on the same cause of action. The Agent dismissed the suit as *res judicata*, and an appeal to the Governor in Council was rejected on the ground that it would be inexpedient and set a bad example and encourage a multitude of suits for the same cause of action. *Held*, by the Judicial Committee, that the legal right to bring a suit and to have it determined by the proper Court created for the purpose of determining such suits cannot be barred upon considerations of policy or expediency. *Also*, that the former decision of a Court adjudged by the High Court to be without jurisdiction cannot be treated as *res judicata*, and the plaintiff was entitled to have his suit tried on the merits by the Agent's Court. SRI

GOVERNOR IN COUNCIL—*conti*

VIKRAMA DEO MAHARAJULUGARU MAHA
JEYPORE *v.* GUNAPURAM DEENABANDHU
ICK (1905) . . . . 9 C. W.
s.c. I. L. R. 28 M

GRANT.

See COGNIZANCE.

See MAINTENANCE . 9 C. W. N

——— *Grant of taluk in Oudh—San*
cessive—Sanad granted in substitution for a
Imposition of rule of inheritance contrary t
law—Validity—Executive act in times of
Effect—Crown Grants Act (XV of 1895)
Pleadings—Issue not specifically
Secondary evidence—Admissibility—Oudh
Act (1 of 1869), s. 22—"Legatee," meani
Before the annexation of Oudh and the proc
of confiscation, a taluk was held by a pers
whom subsequently a summary settlement w
and who in 1859 obtained a *sanad* purpo
terms to be a grant of the taluk to him and
No particular line of inheritance was ind
this *sanad*. After his death the person w
ceeded him as his heir accepted, in 1861, anothe
which imposed a rule of descent different f
laid down by law: *Held*, that it was co
for the latter, who became absolutely ent
inheritance to everything that passed un
earlier grant to surrender it in considerat
re-grant of the same estate on new terms
further, that all doubts regarding the val
the second grant have been removed by
visions of s. 3 of the Crown Grants Act.
Whether after peace has been established in
acquired territory a Government can by an e
act create a line of inheritance different fr
laid down by law. A legatee, who succeeded
before the passing of the Oudh Estates Act,
legatee within its meaning. *Thakurain Balr*
war v. *Rae Jagatpal Singh*, 8 C. W.
s.c. 31 I. A. 142, followed. The Judicia
mittee allowed this appeal on a case, in re
which no specific issue had been settled, the
settled appearing to be sufficiently wide to c
case and their Lordships being satisfied
respondents were not thereby unfairly ta
surprise. RAJ INDRA BAHADUR SINGH
RAGHUBANS KUNWAR (1905) . 9 C. W. N

——— *Mahomedan Law—Transfer*
session—Costs.—On the 5th day of July
a Mahomedan lady, executed a gift of move
immoveable properties, including the house i
she resided, in favour of *A*, *B*, *C*, *D*, *E*, th
and minor children, respectively, of her
son *M*. After the execution of the deed of
took exclusive possession of the house on
and on her children's behalf. On the 7th
July 1901, *J* returned to the house, and
instance, the tenants, who resided on a por
the property transferred, attorned to *A*.
the absence of *J* from July 5th to July 7th
certain furniture and other moveable p

GRANT—*continued*

belonging to her remained in the house, the subject of the gift. On the 15th of October, 1903, *J* died intestate. Upon *S*, the sole surviving daughter of *J*, filing a suit, claiming that the alleged gift was invalid under Mahomedan Law, *Held*, the execution of a deed of gift of immoveable property accompanied by a temporary abandonment of possession by the donor in favour of the transferee and the attornment of tenants to the transferee is a sufficient delivery of seisin to make the gift valid under the Mahomedan Law. The fact that during the abandonment of possession, a portion of the donor's moveable property remains on the premises, and that the donor, after a temporary absence, continues to reside in the same, does not render the transfer of possession inoperative *Shaik Ibrahim* v *Shaik Suleman*, *I L R 9 Bom. 146*, followed. It was within the discretion of the lower Court to allow separate costs to the 1st defendant and her minor children. But only one set of costs was allowed in the appeal. KHAYER SULTAN v RUKHIA SULTAN (1905) . . I. L. R. 29 Bom. 468

——— *Grant, construction of—Holdings, which an Inamdar acquires by purchase from a kadim occupant or by lapse of prior occupancies distinguished from the rights, which he obtains directly from the grant itself*—A grant which purports to be a grant only of the Royal share of the revenue given in commutation of cash theretofore payable as a palanquin allowance, must be construed strictly in favour of the Crown, and is *prima facie* a grant only of the revenue RAIVANT RAMCHANDRA v SECRETARY OF STATE (1905)

I. L. R. 29 Bom. 480

———*Re-grant after confiscation—Exception of Mahals in re-grant—Construction of exception—Title by adverse possession—Estoppel—Mahals treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government—Evidence Act (I of 1872), s 115*—Prior to 1793 the zamindari of Parlakimedi included certain tracts of forest land called *Mahals*, which were held by *Bissoyees* or local chiefs on service tenures in respect of which they paid to the zamindar a sum as *kattubadi* or quit rent; their duties being *inter alia* to keep up an establishment of guards at certain thanas for police purposes. Besides the *Mahals* they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1793 in which the then zamindar took part, the Government by a proclamation issued in 1803 declared that the zamindari was confiscated; and that "the Bissoyees" were henceforward to pay their revenue directly to the Collector and to be for ever under the company's immediate authority; but that they would in due course restore the sanad of the zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees, which are hereby declared separated from the zamindari for ever" This restoration was made in 1803, after the death of the rebellious zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as

GRANT—*continued*

"the lands held by the *Bissoyees*," "the possessions of the Bissoyees," and "all lands or russums or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the *Mahals* as appertaining to the zamindari,—*Held*, that the proper construction of the exception was that it included the *Mahals*, and not only the lands occupied and cultivated by the *Bissoyees*, the *Mahals* therefore did not pass under the re-grant, but remained the property of Government as they had done since the forfeiture. In 1823 the Government transferred the *Bissoyees*, who had been placed in 1800 under the Collector, to the zamindar, and directed that they should be required to pay their quit-rents to him: *Held*, that the arrangement conferred no proprietary right in the *Mahals* upon the zamindar, who incurred thereby no liability for the quit-rents of the *Bissoyees*, but had only to account for what he succeeded in collecting In 1835 certain villages not within the *Mahals* were granted to the zamindar in consideration of his undertaking liability for the quit-rents of the *Bissoyees* *Held*, that such an express grant excluded the inference that the zamindar obtained any proprietary right in the *Mahals* The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision From 1861 to 1893, in consequence of the disability or incapacity of successive zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Mahals, as if they belonged to the zamindari, worked the forests in the *Mahals* and constructed roads through them at the expense of the zamindar and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the *Mahals* as seemed good in the public interest *Held* (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel which would prevent the defendant from denying the plaintiff's title. GOURA CHANDRA GAJAPATI NARAYANA DEO v SECRETARY OF STATE FOR INDIA IN COUNCIL (1905)

I. L. R. 28 Mad. 130
s.c. 9 C. W. N. 553

——— *Injunction—Minerals, working of—Suit by khorposhdar—Specific Relief Act (I of 1877), s 52—Injunction, relief by, when to be granted—Sound discretion—Khorposh grant—Presumption as to title conveyed—Life-grant—Underground rights—Right to rents—Reversion—Jungle-tari lease—Right of lessee to minerals*—In the absence of direct evidence of its terms and failing proof of territorial or family custom to the contrary, a *khorposh* grant cannot be presumed to be of greater duration than for the lifetime of the grantee Such a grant cannot, moreover, be presumed to be more than a grant of rents and profits and does not carry with it a right to open mines and

GRANT—*concluded.*

remove minerals, which are a portion of the soil. Previous to the *Khorposh* grant in question in this case, the grantor had leased away the surface rights in favour of one *G* and subsequent to the grant he conveyed the underground rights to one *C*, who meanwhile had purchased the surface rights from the successors in title of *G*. *Held*, that in this case, the *Khorposhdar* being entitled neither to the minerals nor to the possession of the surface, the Courts in India had properly refused his prayer for an injunction restraining *C* from working the minerals. His rights being limited to the receipt of the rents reserved under the lease to *G* and such other rights, if any, as might be incident to the reversion acquired under the grant, he might possibly be entitled to damages upon proof of injury to his reversion or that his security for the rent would be impaired. But there was no case for granting an injunction. S. 52 of the Specific Relief Act places the grant of an injunction in the sound discretion of the Court. No injunction ought, in the exercise of sound discretion, to be granted where far more injury would be inflicted thereby on the defendant than any advantage accruing to the plaintiff. A lessee under a *jungle-buri* lease became entitled to the use and possession of the surface. The mineral rights remained in the owner. TITURAM MUKERJEE v. COHEN (1905) . . . 9 C. W. N. 1073

———*Grant for maintenance—Babuana property, nature of—Power of grantee to alienate—Kulachar of Darbhanga Raj.—Babuana* property granted in accordance with the *kulachar* or family custom of the Darbhanga Raj is property granted to the junior male members of the family to be enjoyed by them in lieu of money maintenance subject to the proprietary rights of the grantor and his ultimate claim as reversioner on the extinction of the grantee's dependants in the male line. The grantor remains responsible for the payment of the Government revenue and retains his position as the recorded proprietor of the property assigned. The grantee is bound to pay to the grantor such revenue which the latter pays into the Collectorate, and this obligation can be enforced by suit. The grantee has a right to alienate the property subject only to the contingent interest of the grantor. RAMESWAR SINGH v. JIBENDER SINGH (1905).
I. L. R. 32 Calc. 688
s.c. 9 C. W. N. 567

H

HATH-CHITTA.

See LIMITATION ACT, s. 19.
9 C. W. N. 83

———*Entry—Hath-chitta, suit on—Entry relating to acknowledgment of debt—Material alteration—Interpolation of entry as to interest—Document merely relied on as evidence—Effect of interpolation.*—Defendant had acknowledged is indebtedness to plaintiff for a certain sum found due upon an adjustment of accounts, by signing his name over an eight-anna stamp in a hath-chitta. It was found that an entry relating to interest was interpolated in the *hath-chitta*, at a subsequent date. In a suit to recover the amount acknowledged, plaintiff put the *hath-chitta* in evidence, but no reliance was placed on the entry relating to interest, nor was any interest asked for. *Held*, that plaintiff was not suing upon any instrument, which he had fraudulently altered. The entry, on which he relied and which had not been altered or tampered with, was put in merely as an acknowledgment of defendant's liability, and there being no question as to its genuineness, plaintiff was entitled to a decree. The authorities discriminate between cases in which the altered document is the foundation of the claim, and those in which it is only used as evidence. *Gogun Chandra Ghosh* v. *Dhuronidhur Mundul*, I. L. R. 7 Calc. 616; *Christa Charlu* v. *Karibasayya*, I. L. R. 9 Mad. 399; *Atmaram* v. *Umed Ram*, I. L. R. 25 Bom. 616, referred to. HARENDRA LAL ROY CHOWDHRY v. UMA CHARAN GHOSH (1905).
9 C. W. N. 695

HIGH COURT.

——— jurisdiction of.

See APPEAL I. L. R. 32 Calc. 572

See CIVIL PROCEDURE CODE, s. 111.
9 C. W. N. 748

See COPYRIGHT ACT, ss. 3 AND 6.
9 C. W. N. 591

See CRIMINAL PROCEDURE CODE, s. 145.
9 C. W. N. 1046

See CRIMINAL PROCEDURE CODE, s. 195, SUB-S. 6 . . 9 C. W. N. 321

See EVIDENCE ACT, s. 85.
9 C. W. N. 936

See INSOLVENCY . 9 C. W. N. 952

See LETTERS PATENT, s. 39.
9 C. W. N. 366

See PRACTICE I. L. R. 32 Calc. 146

See REVIEW . I. L. R. 27 All. 92

See SANCTION FOR PROSECUTION.
I. L. R. 32 Calc. 379

———*Ordinary Original Jurisdiction—Administration suit—Prayer for setting aside fraudulent award and decree made thereon by a Mofussil Court, and for setting aside leases of land in mofussil obtained by fraud—Accounts—Poojas, expenses for—Enquiry, form of—Executor's liability.*—Where the primary object of a suit instituted on the Original Side of the High Court was the administration of the estate of a deceased testator resident within its jurisdiction

HIGH COURT—*concluded*

principal executor being also resident there and the actual administration going on there *Held*, that the High Court in its Ordinary Original Jurisdiction had a right to order administration of this estate and as ancillary to such an order to set aside deeds obtained by the fraud of the executor The fact that a decree had been granted by the Court of the 24-Pergunnas making a fraudulent award an order of Court would not protect that decree from the jurisdiction of the High Court, when redressing that fraud *Further*, for the due administration of the estate, the High Court could act as de leases of lands outside the territorial limits of its jurisdiction, these leases having been made as an incident of the same fraud. BENODE BEHARI BOSE v SRIMATI NISTARINI DASSI (1905) . 9 C W. N. 991

HINDU LAW

1. ADOPTION
2 ALIENATION
3 CUSTOM
4 DEBTS
5 ENDOWMENT
6. GIFT
7 GUARDIAN
8. INHERITANCE
9 JAINS
10. JOINT FAMILY
11. MAINTENANCE
12 MARRIAGE
13 PARTITION
14. RESTITUTION OF CONJUGAL RIGHTS
15. REVERSIONER
16. STRIDHAN
17 WIDOW
18. WIFE
19 WILL.

See CONTRACT ACT (IX OF 1872) s 23
I L R 27 All 361

See GRANT . . 9 C W N. 1009

See KHOJA MAHOMMEDANS
I. L. R. 29 Bom. 65

See TRANSFER OF PROPERTY ACT
9 C W N 79

See VENDOR AND PURCHASER.
I L R 27 All 271

See WILL.
9 C. W. N. 309, 749, 784

HINDU LAW—ADOPTION

———— *Adoption by widow, under authority from her husband of her brother's grandson*—The rule of Hindu law that a Hindu cannot adopt a child, whose mother he could not lawfully have married, does not apply *a converso* to the case of an adoption made by a widow under authority from her deceased husband, such an adoption being in law an adoption made by the widow as agent on behalf of her husband The adoption therefore by a Hindu widow, in virtue of a written authority to adopt given to her by her deceased husband of her brother's grandson (or son) is not according to Hindu law an invalid adoption *Mussammat Rattan Kuar* v *Lachman Singh*, *All H C 1875, p. 117*, discussed. *Sriramulu* v *Ramayya*, *I L R 3 Mad 15*; *Rajacendra Rau* v *Jagaram Rau*, *I L R 20 Mad 283*; and *Bai Kani* v *Chunilal*, *I L R 22 Bom 873*, followed. *Bhagwan Singh* v *Bhagwan Singh*, *I L R 17 All 294* and *I L R 21 All 412*, and *Chowdry Pudum Singh* v *Koer Oodey Singh*, *12 Moo. I A. 350*, referred to. JAI SINGH PAL SINGH v BIJOY PAL SINGH (1905) . I. L. R. 27 All. 417

———— *Adoption by the widow of a Hindu, who predeceased his father—Presence of the widowed mother-in law at the ceremony of adoption—Acquiescence.*—The widow of a Hindu, who predeceased his father, made an adoption. At the ceremony of adoption the widowed mother-in law of the widow was present. A question having arisen as to whether the presence of the widowed mother in law was equivalent to consent on her part to the adoption *Held*, that mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent had been given, bearing in mind that the consent required is a matter not of form, but of substance BHIMAPPA v BASAWA (1905) . . I. L. R. 29 Bom. 400

———— *Adoption by a widowed daughter-in-law under the direction of the father-in law after his death—Divesting of the estate of daughters—Adoption invalid*—A Hindu testator died leaving him surviving two daughters and a widowed daughter-in law In his will he made the following provision—"I wanted to dispose of the above-mentioned property myself But as I am ill it is not possible for me to do so. Therefore the Panch should give a boy in adoption to my daughter-in law and (thus) keep (the doors of) my house open. After the death of the father in law, the widowed daughter in law adopted a boy under the said provision. The adopted boy having subsequently brought a suit for a declaration of his title as the grandson of the testator the validity of the adoption was impeached by one of the daughters of the testator, whose interest became divested by the adoption. *Held*, that the adoption was invalid From the fact that a husband's authority to his widow to adopt may be operative after his death, it does not follow that a father-in-law's assent survives beyond his lifetime so as to enable his son's widow to divest an estate that had already devolved by inheritance on heirs, who did not derive a title through the son. LAKSHMIBAI v VISHNU VASUDEV (1905)
. I. L. R. 29 Bom. 401

HINDU LAW—ADOPTION—*concluded.*

———— *Adoption by widow—Authority to adopt—Joint family—Gift to daughter out of joint property—Limits of property.*—Where the widow of a deceased coparcener in a joint Hindu family, under an authority to adopt, given to her by her husband's will, adopted a son, and, prior to such adoption, a posthumous son was born to the other coparcener. *Held* (upholding TYABJI, *J.*), the adoption was valid. The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to 15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), the gift was valid, and did not exceed the limits of propriety. BACHOO *v.* MANKOREBAI (1905). I. L. R. 29 Bom. 5

———— *Adoption by senior widow without consulting junior widow—Validity of.*—An adoption made after the death of a Hindu by his senior widow, after having obtained the consent of his sapindas, but without consulting the junior widow, is valid and cannot be impeached on the ground that such adoption has the effect of divesting the estate of the junior widow or her infant daughter. *Rakhmabai* v. *Radhabai, 5 B. H. C., A. C. J. 181 at p. 192; Bhimawa* v. *Sungawa, I. L. R. 22 Bom. 206; Amava* v. *Mahagauda I. L. R. 22 Bom. 416,* referred to and followed. *Subrahmanyam* v. *Venkamma, I. L. R. 26 Mad. 627,* distinguished. The consent of kinsman is required on account of the incapacity of woman to act rather than to procure the consent of all, whose interests will be defeated by the adoption. *The Collector of Madura* v. *Mottoo Ramalinga Sathupatty, 12 M. I. A. 397, 442.* NARAYANASAMI NAICK *v.* MANGAMMAL (1905). I. L. R. 28 Mad. 315

HINDU LAW—ALIENATION.

———— *Widow—Alienation—Costs of litigation—Arrangement between co-widows—Adopted son—Right of the adopted son to set aside the alienation.*—A Hindu died leaving him surviving two widows, *C* and *B*. The two widows after a time found that they could not agree. *C* (the senior widow) passed a document to *B* (the junior widow) on the 17th July 1879, whereby *C* gave *B* possession of certain lands, houses, etc., for her maintenance. Under this arrangement *B* was to carry on the *vahivat* of the same according to her pleasure as long as she might live, and the son, who might be adopted by *C*, would at *B*'s death be entitled to "whatever moveable and immoveable property there is." In 1883 and again in 1885 *B* sold portions of this property to meet certain expenses necessarily incurred by her in litigation. *C* adopted the plaintiff in 1894, and she died in 1895. *B* died in 1902. Some time before her death the plaintiff filed a suit against the defendants, purchasers from *B*, to recover possession of the property alienated by *B*. *Held*, that, under the agreement of 1879, *B* had authority from *C* to do any act necessary for the due and proper management of the property and one of those acts was to pay the costs of the litigation and that, therefore, *B* had implied authority from *C* to alienate the property to meet these costs. *Held*, further, that, under the circumstances of the case, the burden of proof lay upon the plaintiff to show that *C* did not consent to the sale. MAHADEVAPPA *v.* BASAGAWDA (1905) . . I. L. R. 29 Bom. 346

HINDU LAW—ALIENATION—*continued.*

———— *Alienation by widow—Declaratory suit by a reversioner of the second degree—Right of suit—Specific Relief Act (I of 1877), s. 42—Limitation Act (XV of 1877), Sch. II, Arts. 120 and 125.*—Ordinarily only an immediate reversioner can bring a declaratory suit that an alienation by a Hindu widow is not for legal necessity and that the purchase from the widow cannot be in force beyond the lifetime of the widow; but this rule has no application where the immediate reversioner is herself only the holder of a life estate. Although the right of the nearest reversioner, for the time being, to contest an alienation or an adoption by the widow may have been barred by limitation against him, this will not bar the similar rights of subsequent reversioners. *Bhagwanta* v. *Sukhi, I. L. R. 22 All. 33,* relied on. Where the nearest reversioner omitted to sue within the period allowed by Art. 125 of Sch. II of the Limitation Act and thus practically concurred in an alleged improper alienation, the next reversioner became entitled to maintain the suit. *Govinda Pillai* v. *Thayammal, 14 Mad. L. J. 209,* followed. ABINASH CHANDRA MAJUMDAR *v.* HARI NATH SAHA (1905) . . . 9 C. W. N. 25 s.c. I. L. R. 32 Calc. 62

———— *Patia Raj—Right of alienation—Mortgage—Succession by survivorship—Pachis sawal—Legal necessity.*—It is contrary to the custom of the Patia Raj for the holder of the Raj to alienate the property of the Raj, when he has a brother as his heir. The expression *prodhan uttaradhikari* in the *pachis sawal* includes a brother and is not confined to a son. When the brother of the last proprietor succeeded to the Raj by survivorship, he did so subject to the rule of the Mitakshara law that he was liable for debts proved to have been contracted for legal necessity. When a debt is incurred for legal necessity, the creditor discharges his duty, if he shows that there was legal necessity for the loan and he is not bound to see to the application of the money. GOPAL PROSAD BHAKA *v.* RAJAH DIBYA SINGH DEB (1905) . . 9 C. W. N. 330

———— *Alienation by widow of temple property—Suit to declare alienation invalid and not binding on those entitled to succeed the widow as trustee after her death—Bar by limitation—Limitation (Act XV of 1877), Sch. II, Arts. 124, 141—Claim for the recovery of an hereditary office—Succession by Hindu widow to trusteeship of temple.*—A temple was built and dedicated to the public by one Jagayya, who acted as trustee of it during his lifetime. He died childless and his widow succeeded him as trustee. She continued to manage the affairs of the temple until October 1885, when she transferred the right of trusteeship together with certain temple properties to the first defendant. In 1897 the widow died. The plaintiffs as the persons entitled to be trustees in succession to her brought this suit in December 1900, to establish their rights as trustees and to have the transfer in favour of the

HINDU LAW—ALIENATION—*continued*

first defendant declared invalid —*Held*, that the suit was barred under Art 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right had ceased to exist through the operation of the Law of Limitation. *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram*, I L R 23 *Mad* 271, referred to The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word. PUDIGANTAM JAGANNADHA ROW v RAMAYOSS PATNAIK (1905) I. L. R. 28 Mad. 197

——— *Mitakshara—Alienation of impartible Raj—Legal necessity, debt for—Custom—Successor, liability of—Pachis Sawal, authority of*—Alienation by the proprietor of an impartible Raj which is inalienable by custom is valid, if made for legal necessity; and his successor, who takes the Raj by right of survivorship is, under the Mitakshara law liable for the debts proved to have been contracted for legal necessity The *Pachis Sawal* is a work of authority in respect of customs prevailing among the Rajas of the Tributary Mehals of Cuttack. *Bittanund Mundray* v *Sree Lurum Juggernath*, 3 *W R 116*, referred to. GOPAL PROSAD BHAKAT v RAGHUNATH DEB (1905) . . . . I L R. 32 Calc. 158

——— *Widow alienation by—Reversioners—Declaratory decree, suit for—Limitation Act (XV of 1877), Sch II Arts 91 120, 125—Void transaction*—Where a Hindu widow succeeding to her husband's estate had, without any authority from him, executed jointly with her mother in law a deed of gift purporting to dedicate the bulk of his property for the *sheba* of certain idols —*Held* that the transaction was altogether void The deed of gift being *ab initio* void as against the reversionary heir, a suit by him to obtain a declaratory decree that the instrument is invalid and not binding upon him is governed by Art. 120, Sch II of the Limitation Act, and not by Art. 91 it being not necessary for him to have it cancelled or set aside in order to obtain such declaratory relief *Banka Behary Shaha* v *Krishto Gobindo Jourdar*, I L R 30 *Calc.* 433, relied upon. CHOORAMANI DASI v BAIDYA NATH NAIK (1905) I L. R. 32 Calc 473

——— *Suit by a reversioner to set aside a sale by a widow—Alienation by a widow—Limitation Act (XV of 1877) Sch II, Arts 91, 141—Question of law—Admission by a pleader on a question of law, effect of—Appeal—Practice*—When upon the death of a Hindu widow a suit was brought by the reversioner for recovery of property which it was alleged had been alienated by the widow by a deed of sale during her lifetime without legal necessity: *Held*, that Art. 141 of the Second Schedule of the Limitation Act applied and Art. 91 had no application. A question of law which was not argued in the lower Appellate Court, was allowed by the High Court to be urged in second appeal. PAR

HINDU LAW—ALIENATION—*concluded*

OTTER, *J*—A sale by a Hindu widow is of itself void upon her death, whereas a lease is merely voidable at the heir's election. WOODROFFE, *J*—All alienations by a Hindu widow made without legal necessity are voidable and not void in the sense that they are good for her lifetime and may be the subject of consent or ratification by the reversioners during such lifetime or after her death. In the absence, however, of any such ratification or consent by the reversioners the title passed *ipso facto* ceases upon the death of the widow and it is not necessary to set aside such alienations within the meaning of Art. 91 of the Second Schedule to the Limitation Act HARIHAR OJA v. DASARATHI MISRA (1905) 9 C W. N 636

HINDU LAW—CUSTOM.

———*Family custom—Impartible raj—Separate acquisitions of holder of impartible raj—Presumption*—One Raja Fateh Sahi was the owner of a "raj rasat," to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of "babusi" allowance The bulk of the property of the rasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur After the battle of Buxar, in 1764, the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government, until 1801 *Held*, that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran, and *semble* that, even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in Saran, these customs, being part of the personal law of the family, would still govern such after-acquired property It is of the essence of family usages that they should be certain invariable and continuous, and well established discontinuance must be held to destroy them Where, however, such a custom has been proved the onus is upon the party, who alleges the discontinuance thereof, to prove that fact. *Raj Kishen Singh* v. *Ramjoy Surma Mazoomdar*, I L. R 1 *Calc* 186, and *Soorendro Nath Roy* v *Mussammat Heeramonee Burmonean*, 12 *Moo I A 81*, referred to. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom. A compromise between members of a Hindu family whereby "babusi" allowance is fixed and a dispute with regard to the family property is terminated will, if just and legal be binding on the minor children of the parties thereto *Pitam Singh* v *Ujagar Singh*, I L. R 1 *All* 631, and *Chanvirapa* v *Dasava*, I L. R 19 *Bom.* 693, referred to. If the owner of

HINDU LAW—CUSTOM—*concluded.*

an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmipathi* v. *Kandasami, I. L. R. 16 Mad. 54,* and *Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik, I. L. R. 17 Mad. 422,* referred to. SARABJIT PARTAP BAHADUR SAHI *v.* INDARJIT PARTAP BAHADUR SAHI (1905). I. L. R. 27 All. 203

HINDU LAW—DEBTS.

———*Joint Hindu family—Personal decree against father—Liability of son's interests in the joint family property.*—When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale, if the latter can show that the debt in respect of which such decree was obtained, was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay. *Ram Dayal* v. *Durga Singh, I. L. R. 12 All. 209,* overruled. *Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99; Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden, L. R. 16 I. A. 1,* and *Mussamut Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1,* refered to. KARAN SINGH *v.* BHUP SINGH (1905). I. L. R. 27 All. 16

———*Liability of undivided son for surety debt contracted by father.*—Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of such obligation. *Sitaramayya* v. *Venkatramanna, I. L. R. 11 Mad. 373,* and *Tukarambhat* v. *Gangaram, I. L. R. 23 Bom. 454,* followed. CHETTIKULAM VENKITACHALA REDDIAR *v.* CHETTIKULAM KUMARA VENKITACHALA REDDIAR (1905) . . I. L. R. 28 Mad. 377

HINDU LAW—ENDOWMENT.

———*Succession to property of Mahant—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.*—A mortgagee, who was the Mahant of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held,* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh) that the plaintiff on his succession

HINDU LAW—ENDOWMENT—*concluded.*

was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage. BISHAMBAR DAS *v.* DRIGHNAJ SINGH (1905) . . I. L. R. 27 All. 581

———*Religious endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice.*—A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office. *Mayandi Chettiar* v. *Chokkalingam Pillay, I. L. R. 27 Mad. 295,* and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami, I. L. R. 27 Mad. 435,* followed. Where, however, a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure-holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice. NARASIMHA CHARI *v.* GOPALA AYYANGAR (1905) . . . . I. L. R. 28 Mad. 391

HINDU LAW—GIFT.

———*Gift to wife—Powers of alienation of donee—Construction of document.*—Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik) together with land revenue, miscellaneous items, etc." Then came this provision:—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect. *Held,* that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage, unless a legal necessity arose for doing so. *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834,* referred to. JAMNA DAS *v.* RAMAUTAR PANDE (1905). I. L. R. 27 All. 364

———*Gift to daughter out of joint-property—Limits of propriety—Joint family—Hindu Law.*—The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to R15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), the gift was valid, and did not exceed the limits of propriety. BACHOO *v.* MANKOREBAI (1904). I. L. R. 29 Bom. 51

HINDU LAW—ALIENATION—*continued.*

first defendant declared invalid :—*Held*, that the suit was barred under Art 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right had ceased to exist through the operation of the Law of Limitation. *Ounnasambanda Pandara Sannadhi* v *Velu Pandaram, I. L. R. 23 Mad 271*, referred to. The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word. PYDIGANTAM JAGANNADHA ROW v RAMADOSS PATNAIK (1905) I. L. R. 28 Mad. 197

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———— *Widow alienation by—Reversioners—Declaratory decree, suit for—Limitation Act (XV of 1877), Sch II, Arts 91, 120, 125—Void transaction*—Where a Hindu widow succeeding to her husband's estate had, without any authority from him, executed jointly with her mother in law a deed of gift purporting to dedicate the bulk of his property for the *sheba* of certain idols:—*Held* that the transaction was altogether void The deed of gift being *ab initio* void as against the reversionary heir, a suit by him to obtain a declaratory decree that the instrument is invalid and not binding upon him is governed by Art. 120, Sch II of the Limitation Act, and not by Art 91, it being not necessary for him to have it cancelled or set aside in order to obtain such declaratory relief *Banko Behari Shaha* v *Krishto Gobindo Joardar, I. L. R. 30 Calc. 433*, relied upon. CHOORAMANI DASI v BAIDYA NATH NAIK (1905) I. L. R. 32 Calc 473

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HINDU LAW—ALIENATION—*concluded*

GITER, J —A sale by a Hindu widow is of itself void upon her death, whereas a lease is merely voidable at the heir's election WOODROFFE, J—All alienations by a Hindu widow made without legal necessity are voidable and not void in the sense that they are good for her lifetime and may be the subject of consent or ratification by the reversioners during such lifetime or after her death. In the absence, however, of any such ratification or consent by the reversioners the title passed *ipso facto* ceases upon the death of the widow and it is not necessary to set aside such alienations within the meaning of Art. 91 of the Second Schedule to the Limitation Act. HARIHAR OJA v DASARATHI MISRA (1905) 9 C W N 636

HINDU LAW—CUSTOM.

———— *Family custom—Impartible raj—Separate acquisitions of holder of impartible raj—Presumption*—One Raja Fateh Sahi was the owner of a "raj riasat," to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of "babuai" allowance The bulk of the property of the riasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur After the battle of Buxar, in 1764, the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government, until 1801. *Held*, that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran, and *semble* that, even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in Saran, these customs, being part of the personal law of the family, would still govern such after-acquired property It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them Where, however, such a custom has been proved the onus is upon the party, who alleges the discontinuance thereof, to prove that fact. *Raj Kishen Singh* v *Ramjoy Surma Mozoomdar, I. L. R 1 Calc 186*, and *Soorendro Nath Roy* v *Musammat Heeramonee Burmoneah, 12 Moo I A. 81*, referred to But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom. A compromise between members of a Hindu family whereby "babuai" allowance is fixed and a dispute with regard to the family property is terminated will, if just and legal, be binding on the minor children of the parties thereto. *Pitam Singh* v *Ujagar Singh, I. L. R. 1 All 651*, and *Chantiapa* v *Donana, I L R. 19 Bom. 593*, referred to If the owner of

HINDU LAW—CUSTOM—*concluded.*

an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmipathi* v. *Kandasami, I. L. R. 16 Mad. 54,* and *Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik, I. L. R. 17 Mad. 422,* referred to. SARABJIT PARTAP BAHADUR SAHI *v.* INDARJIT PARTAP BAHADUR SAHI (1905).
I. L. R. 27 All. 203

HINDU LAW—DEBTS.

———*Joint Hindu family—Personal decree against father—Liability of son's interests in the joint family property.*—When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale, if the latter can show that *the debt in respect of which such decree was obtained,* was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay. *Ram Dayal* v. *Durga Singh, I. L. R. 12 All. 209,* overruled. *Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99; Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden, L. R. 16 I. A. 1,* and *Mussamut Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1,* refered to. KARAN SINGH *v.* BHUP SINGH (1905).
I. L. R. 27 All. 16

———*Liability of undivided son for surety debt contracted by father.*—Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of such obligation. *Sitaramayya* v. *Venkatramanna, I. L. R. 11 Mad. 373,* and *Tukarambhat* v. *Gangaram, I. L. R. 23 Bom. 454,* followed. CHETTIKULAM VENKITACHALA REDDIAR *v.* CHETTIKULAM KUMARA VENKITACHALA REDDIAR (1905) . . I. L. R. 28 Mad. 377

HINDU LAW—ENDOWMENT.

———*Succession to property of Mahant—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.*—A mortgagee, who was the Mahant of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held,* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh) that the plaintiff on his succession

HINDU LAW—ENDOWMENT—*concluded.*

was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage. BISHAMBAR DAS *v.* DRIGBIJA I SINGH (1905) . . I. L. R. 27 All. 581

———*Religious endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice.*—A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office. *Mayandi Chettiar* v. *Chokkalingam Pillay, I. L. R. 27 Mad. 295,* and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami, I. L. R. 27 Mad. 435,* followed. Where, however, a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure-holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice. NARASIMHA CHARI *v.* GOPALA AYYANGAR *(1905)* . . . . *I. L. R. 28 Mad. 391*

HINDU LAW—GIFT.

———*Gift to wife—Powers of alienation of donee—Construction of document.*—Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik) together with land revenue, miscellaneous items, etc." Then came this provision :—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect. *Held,* that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage, unless a legal necessity arose for doing so. *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834,* referred to. JAMNA DAS *v.* RAMAUTAR PANDE (1905).
I. L. R. 27 All. 364

———*Gift to daughter out of joint-property—Limits of propriety—Joint family—Hindu Law.*—The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to R15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), the gift was valid, and did not exceed the limits of propriety. BACHOO *v.* MANKOREBAI (1904).
I. L. R. 29 Bom. 51